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No. 2292

United States
Circuit Court of Appeals

For the Ninth Circuit.

PACIFIC TOW BOAT COMPANY, a
Corporation of the State of Washing-
ton, Owner of the Tug "ARGO,"
Appellant,
vs.
IVOR NORDSTROM, Intervener,
Appellee.

In the Matter of the Petition of the
PACIFIC TOW BOAT COMPANY,
a Corporation of the State of Washing-
ton, Owner of the Tug "ARGO," for
Limitation of Liability.

Transcript of Record.

Upon Appeal from the United States District Court for
the Western District of Washington,
Northern Division.

FILED

AUG 26 1913

Records of U. S. Circuit
Court of Appeals
830



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Circuit Court of Appeals

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*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 4779

IN THE MATTER OF THE PETITION OF
THE PACIFIC TOW BOAT COMPANY, a corporation of the State of Washington, owner of the
Tug "Argo," for the limitation of liability.

NAMES AND ADDRESSES OF COUNSEL.

C. H. HANFORD, Esq., Proctor for Petitioner and
Appellant, 212 Colman Building,
Seattle, Washington.

WALTER S. FULTON, Esq., Proctor for Claimant
and Appellee, 1110 Hoge Building,
Seattle, Washington.

C. S. HALL, Esq., Proctor for Claimant and Appellee, 817 Alaska Building, Seattle, Washington.

HOWARD G. COSGROVE, Esq., Proctor for
Claimant and Appellee, 817 Alaska Building, Seattle, Washington.

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 4779

IN THE MATTER OF THE PETITION OF
THE PACIFIC TOW BOAT COMPANY, a cor-
poration of the State of Washington, owner of the
Tug "Argo" for the limitation of liability.

APOSTLES ON APPEAL.

Statement, summarizing the proceedings in the
above entitled Court and Cause to comply with the
requirements of Admiralty Rule 4 of the United
States Circuit Court of Appeals for the Ninth Cir-
cuit.

November 6, 1911, Suit commenced.

The Pacific Tow Boat Company, a corporation of
the State of Washington, Owner of the Tug
"Argo," is the name of the only original party.

Ivor Nordstrom the only other party intervened,
claiming damages for a personal injury.

The Proctors for the respective parties are:
Byers & Byers, for the Petitioner, originally. C. H.
Hanford was substituted before the appeal was
taken. Walter S. Fulton and Calvin S. Hall, Proc-
tors for Nordstrom.

November, 6, 1911. Petition for limitation of liability filed.

“ “ “ Stipulation for Costs filed.

“ “ “ Restraining Order filed and entered.

“ 7, “ Monition issued.

“ 8, “ “ returned.

“ “ “ Stipulation for value filed.

No party was arrested, no bail taken and no property attached.

December 23. Claim of Nordstrom filed.

“ “ Answer of “ “

January 2, 1912. Stipulation as to amount of liability filed.

The case was referred to W. D. Totten, U. S. Commissioner, to take proof of claims and evidence as to right of Petitioner to exemption from or limitation of liability.

October 28, 1912. Commissioner's report filed.

“ “ “ Testimony filed.

“ “ “ Exhibits A - B - C - D -
E - F & G filed.

The name of the Judge who heard and decided the case is Honorable Clinton W. Howard.

November 29, 1912. Date of final Hearing.

March	1, 1913,	Memorandum Decision filed.
"	3, "	Petition for re-examination and review filed.
"	" "	Final Decree entered and filed.
"	7, "	Statement of Costs and notice to tax filed.
"	8, "	Order Staying proceedings pending appeal and fixing amount of bond entered and filed.
"	12, "	Supersedeas Bond filed and en- tered.
"	14, "	Notice of Substitution of proc- tor for Petitioner filed.
April	29, 1913,	Petition for rehearing denied.
July	12, "	Notice of appeal filed and served.
"	14, "	Assignment of errors filed.
"	" "	Cost Bond on appeal filed and entered.

TITLE OF COURT AND CAUSE.

The libel and petition of the Pacific Tow Boat Company, owner of the steamer or tug "ARGO," in the cause of action, civil and maritime, respectfully shows:

ARTICLE I.

That your petitioner is a corporation duly created, organized and existing under and by virtue of the laws of the State of Washington, having its principal offices at Seattle, Washington, and owns and

operates a fleet of steamboats or tug boats upon the waters of Puget Sound for the towing of freight, logs, scows, etc., for hire and was engaged thus in the transportation business on Puget Sound at all the times hereinafter mentioned, and was the sole owner of the steamer or tug "Argo" which was engaged in the transportation of cargo by towing same during all of said times.

ARTICLE II.

That on or about the 22nd day of November, while the said steamer was engaged in navigation upon the navigable waters of the United States and within this district upon the waters of Puget Sound, proceeding on her voyage from Richmond Beach to Seattle, one Ivor Nordstrom was injured upon the said vessel. That the said vessel was at that time manned and equipped in full compliance with the laws of the United States and the rules of navigation in such cases made and provided, and was carrying each, every and all of the lights, equipment and appliances required by the laws and rules and was fully found in every particular and was constructed in all particulars in compliance with the rules established by the laws of the United States.

ARTICLE III.

As she was proceeding on said voyage said Ivor Nordstrom, who alleges that he was a fireman on the said boat, while engaged in his duties as fireman, claims to have been injured by his foot slip-

ping through a guard, which it was alleged was constructed around the crank-pit, and that the said foot was crushed in said crank-pit, but in truth and in fact the said Nordstrom was injured by his own carelessness and on account of his own fault and negligence, and not on account of any fault in the management, care, equipment, construction or control of any fault whatever of said vessel or its owner.

ARTICLE IV.

That the said "Argo" had at the said time no passengers and had earned as freight or for towing on said voyage the sum of no dollars, and she was at the time of the alleged accident as aforesaid under the care and command of R. W. Wahl, Master, duly licensed in full compliance with the laws of the United States and the rules of navigation in such cases made and provided, and was fully manned and equipped as hereinabove set forth.

ARTICLE V.

That none of her owners were on the boat or present or had any knowledge of said accident or the cause thereof until after the time of its occurrence.

ARTICLE VI.

It is claimed by said Nordstrom and may be claimed by others that by and because of the carelessness and negligence of this petitioner in not

properly constructing the said vessel, and in not furnishing him a safe and proper place to perform his duties, that he was injured and he has brought suit against your petition in the sum of Twenty-five Thousand Dollars (\$25,000.) as owner and operator of said boat in the Superior Court of the State of Washington for damages by and because of said accident and said suit is now pending, but the value of the said steamer "Argo" does not exceed the sum of Five Thousand Dollars (\$5000.00).

ARTICLE VII.

That your petitioner has a valid and meritorious defense to the claim of said Nordstrom or any claim that may be brought against your petitioner or the said vessel by and because of the fact that said accident was without the fault of your petitioner or of the said vessel as hereinabove set forth, and on account of the fact that the said steamer and the guard thereof were at the said time of the accident the same as at the time the said vessel was constructed, approved by the officers and inspectors of the United States, and had been approved and passed by said inspectors at each annual inspection since the construction of said vessel.

ARTICLE VIII.

Your petitioner therefore on the facts and circumstances aforesaid, desires and claims the benefit of limitation of liability according to the maritime law and practice and the laws of the United States

in such cases made and provided and in manner and form as prescribed by the rules and practice in matters of maritime nature.

ARTICLE IX.

Your petitioner further says that the said accident occurred without the design, negligence, privacy or knowledge of your petitioner; that all and singular the premises herein are true and within the admiralty and maritime jurisdiction of this Court.

WHEREFORE your petitioner respectfully prays for the proper relief in that behalf and that you will be pleased to cause due appraisement to be had of the value of the said steamer or tug in the condition in which she was immediately after said accident, and upon the ascertaining of the value, make an order for the payment thereof into Court or for the giving of a stipulation with sureties thereto for the payment into Court whenever the same shall be ordered, pursuant to the laws and rules and practice of this Court and for monition against all persons claiming such loss or damage or injury, and all other persons having any claim of whatsoever nature against the said vessel, citing them and each of them to appear in this Court and make due proof of their respective claims on or before a certain time to be made in said writ; and that public notice of said monition may be given according to law and that the rules and practice of this Court in matters maritime. As to

all such claims your petitioner will contest its liability and the liability of its vessel independently of the limitation of liability claimed as aforesaid, and that the said Nordstrom as plaintiff in the suit aforesaid and all other persons who may hereafter make similar or other claims, may, each and every of them be severally restrained from further prosecution of any suit and all and every suit or suits against your petitioner with regard to any such claim or claims, and your petitioner further prays that it may have such other and further relief as it may be entitled to under the rules and practice of this Court in maritime matters.

PACIFIC TOW BOAT COMPANY,

By A. L. McNealy.

Its Manager.

BYERS & BYERS.

Proctors for Petitioner.

UNITED STATES OF AMERICA

}
}ss.

WESTERN DISTRICT OF WASHINGTON]

A. L. McNEALY being first duly sworn, on oath deposes and says that he is the Manager of the Pacific Tow Boat Company, a corporation, the petitioner in the within and foregoin petition; that he has read the same, knows the contents thereof and that the matters stated therein are true as he verily

believes and that he verifies this petition on behalf of the Pacific Tow Boat Company.

A. L. McNEALY.

Subscribed and sworn to before me this 6th day of November A. D. 1911.

ALPHEUS BYERS,
Notary Public in and for the State of Washington,
residing at Seattle.

Indorsed: Petition. Filed in the U. S. District Court, Western Dist. of Washington, Nov. 6, 1911.
A. W. Engle, Clerk.

TITLE OF COURT AND CAUSE.

ORDER.

Upon reading the petition of the Pacific Tow Boat Company, owner of the vessel "ARGO" setting forth that the owner has been sued by one Iver Nordstrom for damages in the sum of Twenty-five Thousand Dollars (\$25,000.) occurring while an employee on said vessel, while said vessel was en-route in the Waters of Puget Sound; and that said vessel is of the value of Five Thousand Dollars (\$5000.), and that said damages or injury, if any, was occasioned or incurred without the privity or knowledge of the owner, and that said petitioner desires to claim the benefit of limitation of liability as by law in such cases made and provided, and also to contest the said liability of said vessel and her

owner for any loss, damage or injury consequent upon said accident, and independently of the limitation of liability claimed under said statute;

IT IS ORDERED that a monition issue under the seal of this Court to all persons claiming damage by reason of said accident citing them and each of them to appear before this Court and make due proof of their claims on or before the 23d day of December, 1911, at 10:00 o'clock, and W. D. Totten, United States Commissioner of this Court is hereby appointed Commissioner before whom such claim shall be presented;

AND it is further ORDERED that said monition may be made by service of a copy on the attorney or attorneys or any person who may have brought suit for damages against the said vessel by and because of said accident;

AND it is further ORDERED that the said Iver Nordstrom and all and every other person or persons who have or claim to have suffered damage by reason of said accident, and each of them and their respective agents, attorneys and proctors, be restrained from prosecuting any suit now pending or any suit hereafter to be begun against the steamer or tug "ARGO" and against the Pacific Tow Boat Company.

Done in Open Court at Seattle, Washington, this 6th day of November, A. D. 1911.

(SEAL)

C. H. HANFORD,
Judge.

DEPARTMENT OF JUSTICE
OFFICE OF UNITED STATES MARSHAL,
WESTERN DISTRICT OF WASHINGTON

RETURN OF SERVICE ON WRIT

I hereby certify and return that I served the annexed Order on Higgins, Hall and Halverstadt, attorneys of record for Iver Nordstrom, by handing to and leaving a true and correct copy thereof with Calvin S. Hall, a member of the firm of Higgins, Hall and Halverstadt at Seattle, Western District of Washington, on the 6th day of November, 1911.

JOSEPH R. H. JACOBY,
November 6, 1911. United States Marshal.

Fees: \$2.12. By Fred M. Lathe, Deputy.

Indorsed: Order. Filed in the U. S. District Court, Western Dist. of Washington, Nov. 6, 1911.
A. W. Engle, Clerk.

TITLE OF COURT AND CAUSE.

CLAIM OF IVOR NORDSTROM.

UNITED STATES OR AMERICA,
WESTERN DISTRICT OF WASHINGTON, } ss.
NORTHERN DIVISION.

IVOR NORDSTROM, being first duly sworn,
on oath says:

The claim of Ivor Nordstrom against the steam-tug "Argo," now presented in response to the motion issued out of the above entitled court in the above entitled cause and in compliance therewith, yet not waiving any of the objections heretofore made in the answer of this claimant to the petition of said Pacific Tow Boat Company, a corporation, as owner of the Tug "Argo" for limitation of liability, and reserving to this claimant all exceptions and objections mentioned in said answer, is as follows:

I.

That during all the times herein mentioned the said Pacific Tow Boat Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Washington, and during all of said time said petitioner was and now is engaged in the towing business in the City of Seattle and was and now is the owner and operator of the steam-tug "Argo."

II.

That at the time claimant received the injuries hereinafter complained of he was able-bodied, twenty years of age, and capable of and actually earning to-wit: sixty (\$60.00) a month.

III.

That on said steam-tug "Argo" on the 22nd day of November, 1910, and for several months prior

thereto, said petitioner maintained a passage-way around the engine and crank-pit for the use of and which was used by the employes of said petitioner, including the firemen working on said tug; that in order to prevent the employes using said passage-way from slipping into or being thrown into said crankpit said petitioner, for a long time to-wit: two months prior to the time claimant was injured, had constructed and all of said time and up to and including the time said claimant was injured maintained a guard of sheet iron fastened to the inside of the uprights or standards of said engine; that said guard was negligently and carelessly constructed and was dangerous and defective in that said sheet iron guard was placed on the inside instead of the outside of said standards; that the lower part of said sheet iron was not fastened to said standards so that the bottom of said guard was loose and yielding and that said sheet iron was too light, thus making it unsafe and insufficient for the purpose for which it was intended and used, and a menace to the lives and limbs of the employes so using said passage way; that said petitioner, by the exercise of reasonable care, should have known and said petitioner did know of the dangerous and defective construction and condition of said guard.

IV.

That from the 10th day of October, 1910, up to and including the time he received his injuries as hereinafter alleged, said claimant was employed

by said petitioner as a fireman on said Tug "Argo," and as such fireman it was his duty to oil the engine, thus making it necessary for him to use and he did use said passage way around said engine and crankpit; that at the time said claimant entered into said employment and during all of such time, up to and including the time he was injured, he was young and totally inexperienced in the use and operation of steam vessels, and particularly in the use of steam tugs; that said petitioner negligently and carelessly failed to warn this claimant of the dangerous and defective construction and condition of said guard and failed to warn said claimant of the perils and dangers incident to the use and operation of steam vessels and of the dangers attendant upon the duties of a fireman and said claimant was unaware of the same and said petitioner knew of claimant's inexperience and lack of knowledge in the use and operation of steam tugs, and the dangers attendant upon the duties of fireman.

V.

That on said 22nd day of November, 1910, while this claimant as fireman aforesaid was using said passage way in the oiling of said engine, said tug gave a lurch and this claimant was thrown over and against said sheet iron guard, causing his left foot to strike the bottom of said guard; that owing to such dangerous and defective construction and condition of said guard the bottom gave way, permit-

ting the foot of said claimant to extend into said crankpit and into and against the revolving cranks in said pit; that owing to such dangerous and defective construction and condition of said guard said claimant was unable to withdraw his foot from said crankpit and it was caught by said revolving cranks, so crushing and mangling claimant's said left leg that it was necessary to amputate the same just below the knee, crippling him for life and causing him great suffering and humiliation; that prior to and since said amputation said claimant has undergone several serious operations on said leg as the result of said injuries; that said claimant, on account of said injuries, has been compelled to be in a hospital nearly all of the time since said injuries were received; that on account of the shock of said amputation and the shock of said operations and the pain and suffering he has undergone claimant has been in such a weakened condition that he has been unable to perform any labor whatsoever since said accident, and that it will be a long time before claimant will be in a physical condition to do anything at all; that on account of said injuries and such operations he has suffered great pain and will continue to suffer great pain on account thereof, all to his damage in the sum of twenty-five thousand dollars (\$25,000.00).

WHEREFORE, this claimant respectfully prays:

1. That this Honorable Court will refuse to take further cognizance of this cause and that it will

deny any relief to the petitioner and will dismiss this claimant hence without day, with costs taxed in his favor.

2. That if this Honorable Court should, notwithstanding the prayer of this claimant and his respectful objection to the jurisdiction of this court, retain jurisdiction and proceed to try the same, that this Honorable Court will deny the petitioner any relief whatsoever herein, on the ground that said injuries to claimant occurred with the privity and knowledge of the petitioner and that on that account the cause be dismissed and claimant allowed to go hence without day and have his costs herein.

3. That if this Honorable Court shall deny each of the foregoing prayers, that it then proceed to determine the facts in this cause and proceed to the determination of the rights of the petitioner and the claimant in this cause, and award claimant the sum of twenty-five thousand dollars (\$25,000.00) or such sum as will fully and properly compensate him for his loss and damage, including any damage sustained by reason or loss of time, including also such sum as will fully compensate him for the pain and suffering endured by him since receiving his said injuries or that may be sustained by him in the future, and that the payment of said sum or so much thereof as shall be found to fully compensate him shall be enforced by such judgment, order or decree of this Honorable Court as shall conform to the rules and practices of courts of admiralty in

such cases made and provided, and that he may also have his costs in this behalf expended.

IVOR NORDSTROM,

Claimant.

WALTER S. FULTON,

HIGGINS, HALL & HALVERSTADT,

Proctors.

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF WASHINGTON, ss.
NORTHERN DIVISION.

IVOR NORDSTROM, being first duly sworn on oath deposes and says: That he is the claimant mentioned in the foregoing claim; that he has read the same, knows the contents thereof and that the same is true as he verily believes.

IVOR NORDSTROM.

Subscribed and sworn to before me this 21st day of December, 1911.

CALVIN S. HALL.

Notary Public in and for the State of Washington,
residing at Seattle.

(Notarial Seal)

Copy of within Claim received and due service of same acknowledged this 21st day of December, 1911.

BYERS & BYERS,

Proctors for Petitioner.

Indorsed: Claim of Ivor Nordstrom. Filed in U. S. District Court, Western Dist. of Washington, Dec. 23, 1911. A. W. Engle, Clerk.

TITLE OF COURT AND CAUSE.

ANSWER OF THE RESPONDENT, IVOR
NORDSTROM, TO THE PETITION OF
PACIFIC TOW BOAT COMPANY.

The respondent, Ivor Nordstrom, for his answer to the petition of the Pacific Tow Boat Company, a corporation, filed herein, respectfully says:

I.

Answering article one, this respondent admits the same.

II.

Answering article two, respondent admits that on or about the 22nd day of November, 1910, while the said steamer "Argo" was engaged in navigating upon the navigable waters of the United States and within this district upon the waters of Puget Sound, proceeding on her voyage from Richmond Beach to Seattle, said respondent was injured upon said vessel. This respondent denies that said vessel was at that time manned and equipped in full compliance with the laws of the United States and the rules of navigation in such cases made and provided; denies that said vessel was carrying each, every and all of the lights, equipment and appliances required by the laws and rules, and denies that said vessel was fully manned in every particular and denies that said vessel was constructed in all particulars in compliance with the rules established by the laws of the United States.

III.

Answering article three, this respondent admits that as said vessel was proceeding on said voyage, said Ivor Nordstrom, who was fireman on said boat, while engaged in his duties as fireman, was injured by his foot slipping through a guard constructed around the crank pit, and admits that his foot was crushed in said crank pit, but denies that he was injured by his own carelessness or on account of his own fault and negligence, and denies that it was not on account of any fault in the management, care, equipment, construction or control or any fault whatever of said vessel or its owner, and alleges that said injury was caused on account of the fault and negligence of said petitioner and said vessel, and was caused by reason of the defective construction and condition of said guard around said crank pit; that said guard was negligently and carelessly constructed and was dangerous and defective in that said guard was placed on the inside instead of on the outside of the standards of said engine; that the lower part of said sheet iron guard was not fastened to the said standards so that the bottom of said guard was loose and yielding, and that said sheet iron guard was too light, thus making it unsafe and insufficient for the purpose for which it was intended and used, and that it was a menace to the lives and limbs of the employes using said passage way; that said guard had been in such defective and dangerous condition for to-wit:

two months immediately prior to said accident, and its defective and dangerous condition was during all of said times known by said petitioner, but was unknown to this respondent.

IV.

Answering article four, respondent admits that said "Argo" at the said time had no passengers and had earned as fare or for towing on said voyage the sum of no dollars; admits that at the time of said accident said vessel was under the care and command of R. W. Wahl, Master, but respondent has no knowledge as to whether or not said R. W. Wahl, Master, was duly licensed in full compliance with the laws of the United States and the rules of navigation in such cases made and provided, and requires proof of the same; respondent denies that said vessel was fully manned and equipped.

V.

Answering article five, respondent has no knowledge as to the allegation that none of her owners was on the boat, and therefore requires proof of the same; respondent denies that none of her owners had knowledge of said accident or the cause thereof until after the time of its occurrence, but alleges that said petitioner and its managing agents had knowledge of the defective construction and dangerous condition of said guard as hereinbefore alleged.

VI.

Answering article six, respondent admits that he claims that he was injured by and because of the carelessness and negligence of said petitioner in not properly constructing said vessel and in not furnishing him a safe and proper place to perform his duties, and admits that he has brought suit against said petitioner as owner and operator of said boat, in the sum of twenty-five thousand dollars (\$25,000.00), in the Superior Court of the State of Washington for King County, for damages by and because of said accident, and admits that said suit is now pending, but denies that the value of said steamer "Argo" does not exceed the sum of five thousand dollars (\$5,000.00). Respondent alleges that said steamer "Argo" at said time was of the value of fourteen thousand dollars (\$14,000.00).

VII.

Answering article seven, this respondent denies that petitioner has a valid and meritorious defense to the claim of this respondent; denies that said accident was without the fault of said petitioner or of said vessel. Respondent has no knowledge as to the allegation that said guard was the same as at the time the said vessel was constructed, and therefore requires proof of the same; respondent denies that said guard was approved by the officers and inspectors of the United States, and denies that the same had been approved and passed by said in-

spectors at each annual inspection since the construction of said vessel.

VIII.

Answering article eight, respondent denies that said petitioner has a right to claim the benefit of limitation of liability according to the American law in practice and the laws of the United States in such cases made and provided, and in manner and form as prescribed by the rules and practices in matters of maritime nature.

IX.

Answering article nine, respondent denies that said accident occurred without the design, negligence, privity or knowledge of said petitioner, denies that all and singular the premises contained in said petition are true, and denies that the same is within the admiralty and maritime jurisdiction of this court; respondent alleges that said accident occurred by reason of the negligence of said petitioner, and alleges that it occurred with the privity and knowledge of said petitioner.

And further answering the said petition, respondent respectfully shows unto the court as follows:

I.

That during all the times herein mentioned said petitioner, Pacific Tow Boat Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Washington,

and during all of said times was and now is engaged in the towing business in the City of Seattle, and was and now is the owner and operator of the steam tug "Argo."

II.

That at the time he was injured as hereinafter alleged, respondent was able-bodied, twenty years of age and capable of and actually earning, to-wit: sixty dollars (\$60.00) a month.

III.

That on said steam tug "Argo," on the 22nd day of November, 1910, and for a long time prior thereto, said petitioner maintained a passage way around the engine and crank pit for the use of, and which was used by the employes of said petitioner, including the firemen working on said tug; that in order to prevent the employes from using said passage way from slipping into or being thrown into said crank pit, said petitioner for a long time, to-wit: two months prior to the time said respondent was injured, had constructed, and all of said times and up to and including the time said respondent was injured, maintained a guard of sheet iron fastened to the inside of the uprights or standards of said engine; that said guard was negligently and carelessly constructed and was dangerous and defective in that said sheet iron guard was placed on the inside instead of on the outside of said standards; that the lower part of said sheet iron guard was not

fastened to the said standards so that the bottom of said guard was loose and yielding, and that said sheet iron was too light, thus making it unsafe and insufficient for the purpose for which it was intended and used, and it was a menace to the lives and limbs of said employes so using said passage way; that said petitioner, by the exercise of reasonable care should have known and said petitioner, including its managing agent and officers, did know of the dangerous and defective construction and condition of said guard.

IV.

That from the tenth day of October, 1910, up to and including the time he received his injuries as hereinafter alleged, this respondent was employed by said petitioner as a fireman on said tug "Argo," and as such fireman it was his duty to oil the engine, thus making it necessary for him to use, and he did use said passage way around said engine and crank pit; that at the time said respondent entered said employment, and during all of said times up to and including the time he was injured, he was young and totally inexperienced in the use and operation of steam vessels, and particularly in the use of steam tugs, all of which said petitioner knew; that said petitioner and its managing agents and each of them, negligently and carelessly failed to warn said respondent of the dangerous and defective construction and condition of said guard, and failed to warn said respondent of the perils and dangers incident

to the use and operation of steam vessels, and of the dangers attendant upon the duties of fireman, and said respondent was unaware of the same.

V.

That on, to-wit: the 22nd day of November, 1910, while this respondent as fireman aforesaid was using said passage way in the oiling of said engine, said tug gave a lurch and this respondent was thrown over and against said sheet iron guard, causing his left foot to strike the bottom of said guard, that owing to the said dangerous and defective construction and condition of said guard, the bottom gave way, permitting the foot of this respondent to extend into said crank pit, and into and against the revolving cranks in said pit; that owing to said dangerous and defective construction and condition of said guard, this respondent was unable to withdraw his foot from said crank pit, and it was caught by said revolving cranks, so crushing and mangling respondent's left leg that it was necessary to amputate the same, and it was amputated just below the knee, crippling him for life and causing him great suffering and humiliation; that prior to and since said amputation, this respondent has undergone several serious operations on said leg as the result of said injuries, and has suffered and will continue to suffer great pain on account thereof; that his earning capacity has been greatly and seriously impaired, all to his damage in the sum of twenty-five thousand dollars (\$25,000.00).

WHEREFORE, this respondent respectfully prays:

1. That this Honorable Court will refuse to take further cognizance of this cause and that it will deny any relief to the petitioner and will dismiss this respondent hence without day, with costs taxed in his favor.

2. That if this Honorable Court should, notwithstanding the prayer of this respondent and his respectful objection to the jurisdiction of this court, retain jurisdiction and proceed to try the same, that this Honorable Court will deny the petitioner any relief whatsoever herein, on the ground that said injuries to respondent occurred with the privacy of the petitioner, and that on that account the cause be dismissed and respondent allowed to go hence without day and have his costs herein.

3. That if this Honorable Court shall deny each of the foregoing prayers, that it then proceed to determine the facts in this cause and proceed to the determination of the rights of the petitioner and the respondent in this cause, and award him such a sum as will fully and properly compensate him for his loss and damage, including any damage sustained by reason of loss of time, including also such sum as will fully compensate him for pain and suffering endured by him since receiving his said injuries, or that may be sustained by him in the future, and that the payment of said sum, or so much thereof as shall be found to fully compensate him, shall be enforced by such judgment, order or

decree of this Honorable Court as shall conform to the rules and practices of courts of admiralty in such cases made and provided, and that he may also have his costs in this behalf expended, together with such other and further or different relief as seems proper.

IVOR NORDSTROM,
Respondent.

WALTER S. FULTON,
HIGGINS, HALL, HALVERSTADT,
Proctors for Respondent.

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF WASHINGTON, } ss.
NORTHERN DIVISION.

IVOR NORDSTROM, being first duly sworn on oath says: That I am the respondent named in the foregoing answer: that I have read the same, know the contents thereof and the same is wholly true as I verily believe.

IVOR NORDSTROM.

Subscribed and sworn to before me this 14th day of December, 1911.

CALVIN S. HALL.

Notary Public in and for the State of Washington,
residing at Seattle.
Notarial Seal.

Copy of within Answer received and due service

of same acknowledged this 21st day of December, 1911.

BYERS & BYERS,
Proctors for Petitioner.

Indorsed: Answer of the Respondent, Iver Nordstrom, to the Petition of the Pacific Tow Boat Company. Filed in the U. S. District Court, Western Dist. of Washington, Dec. 23, 1911. A. W. Engle, Clerk.

TITLE OF COURT AND CAUSE.

STIPULATION.

It is hereby stipulated by and between the libellant and petitioner herein, the Pacific Tow Boat Company, and the claimant and respondent herein, Iver Nordstrom, by their proctors Byers & Byers for the petitioner and libellant, and Walter S. Fulton and Higgins, Hall & Halverstadt for the claimant and respondent, that the exceptions heretofore filed by the claimant

I.

“Excepting to the valuation of the said vessel or tug as fixed by the appraisers heretofore appointed by the Court as too low and wholly disproportionate to the value of said boat” and;

II.

“Because the said appraisal was not fairly made and that said appraisers were not sufficiently in-

formed as to the value to make a just and fair appraisal of the tug "Argo," may be overruled and denied, but in lieu of a re-appraisement, the petitioner and libellant and the claimant and respondent hereby agree and stipulate that if the claim of the said claimant shall be allowed in any other or greater sum than the sum of Five Thousand Dollars (\$5000.), for which a bond has heretofore been filed by the petitioner, then that the said petitioner will thereupon either at said time, file in the said court an additional bond in the sum of Three Thousand Dollars (\$3000.) or pay toward the liquidation of said claim a sufficient amount to liquidate the same in excess of the said Five Thousand Dollar (\$5000.) bond, up to the sum of Eight Thousand Dollars (\$8000.), or surrender the said boat to the said court, it being the intent of this stipulation that the petitioner's liability shall be limited to the sum of Eight Thousand Dollars (\$8000.) instead of the sum of Five Thousand Dollars (\$5000.).

It is hereby agreed and understood that this stipulation shall not be held in any manner to effect the proceedings in limitation of liability herein, otherwise than as expressly provided herein.

BYERS & BYERS.

Proctors for Libellant and Petitioner.

WALTER S. FULTON,

HIGGINS, HALL & HALVERSTADT,

Proctors for claimant and respondent.

Service of the within Stip. by delivery of a copy

to the undersigned is hereby acknowledged this 29th day of Dec., 1911.

HIGGINS, HALL & HALVERSTADT.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Jan. 2, 1912, A. W. Engle, Clerk.

COMMISSIONER'S REPORT.

To the HONORABLE CLINTON W. HOWARD,
Judge of the Above Entitled Court:

This matter coming on for hearing this 25th day of January, 1912, the Petitioner appeared by Alpheus A. Byers, Esq., of the firm of Byers & Byers, its Proctors, and the Claimant appeared by Calvin S. Hall, Esq., of the firm of Higgins, Hall and Halverstadt, and Walter S. Fulton, his Proctors; thereupon the following proceedings were had, and testimony taken:

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Witnesses for

Claimant	Direct	Cross	Re-D	Re-C
Frank C. Brownfield....	2	6	15	17
W. R. Chesley.....	21	27	37	39
Dr. F. R. Underwood....	40	42
Iver Nordstrom	43	49	54	55
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John S. Wright.....	66	68	74	76

Witnesses for

Petitioner	Direct	Cross	Re-D	Re-C
A. L. McNealy.....	77	79	88	90
R. W. Wahl.....	92	95
H. S. Studdert.....	107	110	118	121
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Jno. L. Anderson.....	150	152	159	..
Iver Nordstrom	163	175
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Owing to the fact that the testimony taken before me was taken in shorthand by different stenographers, it became necessary to number in red ink all pages after the first 55, being consecutively, Nos. 56 to 179, both inclusive, which comprise the entire report of the testimony and proceedings taken before me.

WM. D. TOTTEN, Commr.

FRANK C. BROWNFIELD, produced as a witness on behalf of the Claimant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HALL:

Q What is your name?

A Brownfield, Frank C.

Q And where do you live, Mr. Brownfield?

A 307 6th Avenue North, City.

Q What is your business?

A Marine engineer.

Q By whom are you now employed?

A The Humboldt Steamship Company.

Q What position do you occupy now?

A Third Assistant Engineer on the Steamer Humboldt.

Q Where were you employed the 22nd day of November, 1910?

A On the tug 'Argo', Pacific Tow Boat Company.

Q How long had you been employed there?

A From the 5th of October.

Q 1910?

A Yes.

Q What was your position on the boat?

A Second engineer.

Q Who was chief engineer?

A Jensen.

Q Are you acquainted with the Claimant Iver Nordstrom?

A Yes, sir.

Q How long had you known him,—were you acquainted with him on the 22nd day of November, 1910?

A Yes, sir.

Q How long had you known him at that time?

A Why, I had known him as long as he was on the boat,—I don't know when he came on the boat.

Q Do you remember his being injured on that day,—the 22nd day of November, 1910?

A Yes, sir.

Q Will you describe the position and condition of what is known as the crank pit?

WITNESS: (Interrupting)—The position and condition of it as it was on that boat,—on the 'Argo'?

MR. HALL: (Continuing)—during the time you were employed there?

A The position of it,—it is just a pit, an encasement that the cranks revolve in that is set down about 2 or 3 inches lower than the floor.

Q And what was in that crank pit?

A What was in it?

Q Yes?

A The cranks revolved in that pit.

Q What was on either side of the crank pit,—was there a passageway?

A There were 2 crank pits,—one for the high press crank and one for the low,—and then there is the front of the engine, is where the fire room is located, and there is a floor there, and at the back, just aft of the engine there was a floor over the shaft,—you could walk around there, too.

Q State whether or not there was a passage way for the employes or people on the boat on either side of the crank pit?

A On either side of the crank pit?

Q Yes?

A The particular crank pit that he was caught in?

Q Yes.

A No; there is no passage way on one side of it.

Q There was a passage way on the other side of it, though?

A Yes, on the other side of the engine.

Q Was there a shield or guard around, separating this passageway from the crank pit?

A On the open side of the engine, yes—in fact, there was a guard on both sides.

Q Well, of what was that guard constructed?

A About 16th sheet iron.

Q And what was it fastened to?

A Fastened to?

Q Yes?

A It was bolted to the top with “U” bolts, bolted on the columns.

Q Was it fastened at the bottom?

A No, sir.

Q Was it on the inside or outside of the columns?

A On the inside of the columns.

Q You mean by that, the inside toward the revolving cranks?

A Yes, sir.

Q How long had it been in that condition?

A As long as I had been aboard.

Q When did you first learn that Mr. Nordstrom was injured?

A About a couple of minutes after it happened.

Q Who told you about it?

A Why, the Captain sung out to me.

Q What did he say?

A He just said "Come on up, the fireman's hurt," or something like that.

Q What did you do then?

A I heard him hollering, and as soon as he sung out to me, why, I got right out and went back to the engine room, and saw him lying there.

Q Well, what did you see when you went up there?

A Iver was lying out on the grating.

Q Did he seem to be in pain?

A Yes, you bet he did.

Q What was his condition as to being injured at that time from what you saw?

A Well, I did not—there was no profuse hemorrhage—I did—

Q Well, what had happened to him?

A His foot was badly torn up and bruised, and looked—it was bleeding bad—and his leg, too; it was all torn (illustrating)—oh, from about 4 inches below his knee down.

Q How long have you been working on boats?

A Off and on since 1902.

Q Have you been employed on different tugs?

A Yes, sir.

Q And in what capacity?

A Fireman, engineer, chief and second engineer.

Q Did your employment make you familiar with the construction of different tugs?

A In regards to anything around the engine room, yes.

Q You say this crank pit was lower than the floor?

A It was, yes, a little.

Q It was lower?

A Yes.

Q Do you remember how many cranks were in that pit?

A There is only one crank in each pit.

Q One in each pit?

A Yes, sir.

Q And was there just one pit guarded by this guard?

A The whole front of the engine was guarded—I mean the open face of the engine.

Q Well, how many pits?

A Two.

Q From your experience and your employment on boats and tugs, is it usual for crank pits such as was on this boat, to be guarded?

A Yes, sir.

Q You stated a little while ago that the lower part of this guard was not fastened to the column?

A No, it was not.

Q Was that noticeable except upon quite a careful examination?

MR. BYERS: I object, because it calls for a conclusion of a witness and is not asking for any fact, and is also objectionable as being a leading question.

WITNESS: Shall I answer?

THE COMMISSIONER: Answer the question.

A The average person would not have noticed it; in fact, the average engineer would not.

MR. HALL: I think that is all.

CROSS EXAMINATION.

BY MR. BYERS:

Q How old are you?

A 26 years.

Q 26 years old. You began work on boats in 1902?

A Yes, sir.

Q That is 10 years ago?

A Yes.

Q Then you began working when you were 16 years of age?

A Yes, sir.

Q What boat did you work on in 1910?

A On the "Clifford Sifton."

Q What was the next boat you worked on?

A On the "Eureka."

Q What was you doing on the "Eureka"?

A Oiling.

Q What was the next boat?

A The "Minnetonka."

Q The "Minnetonka"—and then where did you work?

A Well, for three years I was in the hospital for the Army.

Q Then three years is to be taken from these ten years that you have spoken of before?

A Yes.

Q And when you came out of the Army what did you do?

A Went back to steamboating.

Q Where did you work?

A Went to work on the "Stimson."

Q What year was that?

A 1907.

Q How long did you work there?

A I don't remember now.

Q In what capacity?

A Fireman.

Q Fireman?

A Yes, sir.

Q Then where did you go from the "Stimson"?

A On the "George T."

Q That was with this same fleet as the "Argo," was it?

A Yes, sir.

Q How long did you work on the "George T."?

A Well—oh——

Q How long did you work on that——

A I don't know.

Q Well, approximately?

A About a year.

Q In what capacity?

A Fireman.

Q That takes you down to 1909, does it—you

were fireman until 1909? Now, where did you go from the "George T."?

A From the "George T." to the "Doctor."

Q That is with this same fleet, the Pacific Tow Boat Company?

A She belonged to the International Contract Company.

Q What did you do there?

A Fireman.

Q When did you get your license as engineer?

A 23rd August, 1910.

Q Now, as a matter of fact, then, you have only been an engineer from the 23rd of August, 1910—or not two years yet. That constitutes your experience as an engineer?

A Yes.

Q Now, this engine that you speak of—that was an ordinary 4 1-2 compound engine?

A Yes, sir.

Q It was set in the hold of the boat in an ordinary way?

A Yes, sir.

Q The boiler was set about how far forward?

A I don't remember.

Q Well, it was 6 or 8 feet?

A Yes. That does not make any difference, anyway.

Q Well, answer the questions. There was a passageway between the boiler and the crank pit of the engine—a passageway around the engine on the starboard side?

A Yes.

Q And then there was a passageway around back of the engine shaft, there being a floor laid over the shaft?

A Yes, sir.

Q It is usual in the ordinary way that engine and fire rooms in this class of boat are constructed, as far as you know?

A Well, boats of that size, yes.

Q Now, you say you were present on this evening when Iver Nordstrom was hurt, and were present on the trip?

A Yes.

Q Yes. What kind of weather was it that trip?

A Pretty heavy weather.

Q Blowing?

A Yes.

Q This vessel, the "Argo," is a small vessel, isn't she—you would call her a small vessel—nothing like the "Eureka" or "Humboldt"?

A No.

Q And, of course, she rolled quite a good deal in the swell?

A She was making heavy weather of it.

Q This man Nordstrom was fireman?

A Yes.

Q And you were second engineer?

A Yes.

Q A fireman's duty is to work around the engine, is it?

A Part of his duties.

Q Part of his duties, yes. Did he do any of the oiling?

A Yes.

Q Anyone, even though not a fireman, could see, could he not, on that boat, and would know if he got his foot into the crank pit that he would get hurt?

MR. HALL: I object to the question as not proper cross-examination, and calling for a conclusion of the witness.

A Why—

Q These cranks were in plain view, were they—as a matter of fact?

A Yes, as plain as any other part of the engine.

Q And about at what rate were they revolving?

A About 120.

Q Then that crank shaft would be going through there at 240 times a minute, would it?

A Going around about 120 times a minute, you mean.

Q And there were two crank shafts, were there?

A No, just one.

Q There were two cranks to this engine—one to the high pressure and one to the low, and each of these cranks were passing through there—the pit—at the rate of 120 times a minute?

A Yes.

Q Now, these cranks were traveling through there so rapidly, weren't they, so that anyone would know, and especially one who was a fireman, that if he got his foot into that pit that he could not ex-

tricate it in time to help it from being torn off or being very badly injured?

A *Certainly not.*

Q And that was perfectly apparent, wasn't it?

A Yes, sir.

Q Now, you say that Mr. Nordstrom had been working there as fireman for how long—I don't believe I remember?

A Neither do I.

MR. BYERS: You stated, did you not, before—

MR. HALL: Answer the question.

Q How long, approximately, had he been working there at the time of the accident—to the best of your knowledge?

A I don't remember—a couple of weeks—I could not say.

Q Well, would you say it was less than six weeks?

A Oh, yes; less than six weeks.

Q You are very sure about that, are you?

A Yes.

Q Well, now, was it less than a month?

A I would not say.

Q Yes. Then during this night in this heavy weather that you have spoken of, were you present in the fire room?

A No, sir.

Q Did you see the accident?

A No, sir.

Q You don't know how the accident occurred?

A No, sir.

Q You had been working on this "Argo" for how many months or years, or what length of time?

A Since the 5th of October, that year.

Q And during all of that time, this guard, or what you call a guard, was in exactly the same condition as it was the night when he was hurt?

A Yes, sir.

Q As a matter of fact, this boat had been inspected during that time, had she not?

A During which time?

Q During the time you worked on her?

A She was inspected while I was on her.

Q And she had been inspected prior to the time you were on her?

A Yes, I suppose so.

Q And, as far as you know, this guard was in the same condition at the time of her prior inspections, and at the time of the injury, as it was and had been ever since the boat was built?

A As far as I know—yes.

Q Now, as a matter of fact, Mr. Brownfield, this guard that you speak of, is primarily intended to keep the oil from splashing out of the crank pit, isn't it?

A Oh, they do that—they keep the oil from spluttering out, all right.

MR. BYERS: Well, now, you didn't answer my question, did you?

THE COMMISSIONER: I must caution the

witness to confine himself to answering counsel's questions.

MR. HALL: That is right.

A I would put them there for protection.

Q You would—but do you know what they are put there for?

A The principal thing they are put there for is protection.

Q Are you acquainted with guards on other vessels on the Sound in the same class as this?

A Yes, sir.

Q Now, do you know of other vessels on the Sound that had their—have their guards in just the same way that this vessel had this so-called guard at the time of this accident?

A No.

Q You don't?

A No.

Q How many vessels of the kind and class of this vessel have you inspected?

A I never inspected any of them.

Q Then you would not be very likely to know that this was an unusual way to keep these guards or not, would you?

A Any of the boats that I have ever been on or seen, of that type, have their guards rigged up different from that.

Q What boats have you ever seen that have their guards rigged up differently—that is, of this type of vessel?

A I don't know now.

Q Well, did you ever know of any vessel that you can name that was of this type or character, that had her guards or splash pans rigged up differently from these?

A Yes.

Q What one is it?

A Well, I tell you I don't know as you will find any of them rigged up with their guards rigged the way that one was rigged, inside the columns.

Q Do you know that you won't?

A I have a pretty good idea.

Q We are not wanting ideas—we want facts—we are asking, do you recollect?

A On most boats that I have been with they always had rigs that were bolted to the outside columns, or made fast.

Q What boats of that type have you been on that had their splash pans bolted to the outside of the columns?

A That boat I was on in Juneau.

Q Well, let's confine ourselves to the fleet around Seattle here, if possible.

A There was one.

Q Well, now, if it was not for these pans or guards as you call them, the oil from these crank pits would fly all over the boat, wouldn't it—fly out on each side?

A Yes, sir.

Q These pans are put up to keep that oil from flying?

A That's one of the things.

Q One of the things. Now, they are also put up to keep the oil from running out on the deck or flooring on each side of the crank pit—that's the idea, is it not?

A That is one of the ideas.

Q Now, if you would fasten these splash pans on the outside of the columns, would not the oil fly against the inside of the pan, running down there and run on the outside of the engine frame?

A Sure, it would; it does.

Q Then, if it was put on the outside of the columns, it would not serve the purpose for which it is intended, would it?

A As far as the oil—no.

Q That is, on a good many types of engines?

A No.

Q Now, these engines and engine frames are differently made for these different engines and splash pan—every one must be slightly modified to act as a splash pan for another, in order to effect its purpose?

A Certainly.

MR. BYERS: That's all.

RE-DIRECT EXAMINATION.

BY MR. HALL:

Q When was this boat inspected, if you know?

MR. BYERS: Objected to, as the record of the United States office is the best evidence.

A I don't know.

Q Was it before or after the accident?

A Oh, you mean the inspection of that year?

Q Yes.

A It was after the accident.

Q How long after the accident?

A Just a few days.

Q Do you know approximately the date?

A No, sir.

Q Was it a week, or two weeks?

A Well, the date that the inspector—no, I could not tell you that date.

Q Well, you know it was inspected after the accident?

A Yes.

Q Was the guard in the same condition at that time as it was at the time of the accident?

A No, sir.

Q Did you know of any prior inspection of that boat, of your own knowledge?

A No, sir.

Q Do you know of any splash pans, as Mr. Byers described them, being put on the inside of the columns and not fastened at the bottom?

MR. BYERS: I submit that is objectionable, as he said that he did not know of any that were fastened on the inside, of any character.

A No, I never saw any fastened inside of the columns.

Q What purpose did you suppose that guard served, when you were working on the boat?

MR. BYERS: Objected to as improper, calling exclusively for a conclusion of the witness.

A Why, it served as a guard, so that you would not stick your foot in there; and it also served, as he says, to keep the oil from splashing out.

Q How high was this guard?

A About a foot and a half, or something like that.

Q How wide was it?

A It extended along in front of the two crank pits, about, I guess, about four feet.

Q Now, you say you never inspected any other crank pits. Did you mean by that you had not seen other crank pits?

A No.

Q Did you mean by that, that you had not seen other guards?

A No.

Q What did you mean by that?

A I merely meant that I had never made it a business of—never employed in the business of inspecting other crank pits. I have inspected every crank pit of every boat I was ever on.

Q From your experience, would you say that it was necessary for the protection of the employees of the boat to have a guard there?

MR. BYERS: I object to the question because it is not only calling for the conclusion of the witness, but for a conclusion of law, which he is doubly disqualified to make.

A Why, certainly.

Q For what purpose?

A Why, to keep them from getting their feet caught, and getting hurt.

MR. HALL: That's all.

RE-CROSS EXAMINATION.

BY MR. BYERS:

Q You gave the height of this guard as about 18 inches?

A As near as I can remember.

Q You mean above the engine frame?

A No, I gave it as the width of the sheet iron piece.

Q Now, that width stood up on the engine frame, did it, on the bed?

A Yes.

Q Then how deep is that frame or bed, as you call it?

A How deep?

Q Yes.

A Six inches.

Q That engine frame sets on the engine bed; the engine bed is built into the boat upon timbers, isn't it?

A The engine bed is the cast iron bed.

Q The metal of this engine bed is how thick?

Q The metal—oh, about 1 1-4 inches.

Q About 1 1-4 inches?

A Yes, sir—they are cast hollow.

Q I want you to tell how far about the foot of the columns these so-called guards reached. Do you

understand what I am trying to get? How far was it from the engine bed down to the floor?

A To the floor that you walk on?

Q Yes?

A The bed was below the floor.

Q You are certain of that, are you?

A Yes. In front—

Q Now, this engine bed is set on what?

A Set on timber.

Q Set on timber?

A Yes.

Q And, as a matter of fact, that engine bed is a frame of iron which stands up about six inches?

A Yes.

Q Now, do you mean to say that flooring is six inches thick?

A The flooring there was about inch planks.

Q Then, as a matter of fact, the top of the engine bed would be about up five inches above the flooring?

A No.

Q Then, you mean to state that the flooring on the side, starboard side of the engine, was raised up on false work on 2x4's, so as to bring it up higher than the rest of the engine bed?

A Yes, it was that way. There is hardly any boats that way, rigged exactly with the floors above the beds that way; they are mostly flush right with the beds or a little below the beds—that is, boats of that size. Of course, some of these smaller ones the crank pits are down in the bilge.

Q These engine beds are all constructed slightly different in the different boats, to suit the peculiar build or style of the boat?

A Yes, hardly any two of them alike.

Q Mr. Nordstrom was a fireman, and was a fireman all the time that he was there?

A Yes, sir.

Q And, consequently, working around this engine, his duties kept him in the engine room all the time he was on duty?

A Yes, and the firing room, which was all one.

Q All one—and are a room of approximately—of what size?

A I don't know. I could take a rule down and measure.

MR. HALL: State approximately.

Q Just approximately. I am not asking you for exact figures, I just want as near as you can estimate it.

A Well, the room, with the space that is taken up by the engine, the plant, boilers, engine and everything, is on that boat about 12 feet wide and—oh—about 30 feet long—somewheres about that.

Q But the room from the after end of the boiler to the aft end of the engine was probably about 10x12, isn't it, approximately?

A Yes, about. Well, I guess a little longer.

Q And this guard is, as a matter of fact, considerably longer than you estimated it. It is nearer 7 feet than 4, lengthwise of the pan, is it not—that is, the length of it? You estimated it about 4 feet.

A Oh, you mean of this sheet. It has been quite a while since I have been there. I cannot. Oh, I guess about as long as this table.

MR. HALL: Well, about how long—we cannot have the table there—about how long, approximately?

A I don't remember—put it down 4 feet, because I don't remember. Gee whiz! A man's got a memory—

Q Now, these columns to the engine don't go straight down, or perpendicular, do they?

A No, sir.

Q They don't?

A No, sir.

Q About what angle do they go from the cylinders down to the engine bed? Perhaps to make that clearer, if they were absolutely—

A I know what you mean.

MR. BYERS: I was trying to get it so it would appear in the record as plain as possible. How long are the columns in the first place?

A They are about five feet.

Q Five feet? Now, how much did they average from the perpendicular?

A They would be about 10 degrees.

Q How? In the revolutions of the cranks at their extreme limit—how far?

A That low press column on her, I think, was perpendicular—no, it was not, either—I am getting that mixed up with some other boats.

Q Now, the question is this: The cranks in revolving came approximately how far from the columns, that is if the column was placed immediately opposite the crank, how far would the crank come from hitting it as it revolved?

A On her, she runs pretty close to the column.

Q On her, she runs pretty close to the column?

A Yes, sir.

Q And now you say that this guard was fastened only at the top?

A Yes, sir.

MR. BYERS: That's all.

(Witness excused.)

W. R. CHESLEY, produced as a witness on behalf of the Claimant, being first duly sworn, testified as follows:

Feb. 27, 1912.

DIRECT EXAMINATION.

BY MR. FULTON:

Q What is your name?

A W. R. Chesley.

Q What is your business, Mr. Chesley?

A Tug boat business.

Q Were you formerly connected with the Pacific Tow Boat Company?

A Yes, sir.

Q In what capacity?

A Manager.

Q Were you, and are you still a stockholder in this corporation?

A I am—not exactly in the Pacific Tow Boat Company; in the Chesley Tow Boat Company, who has an interest in the Pacific Tow Boat Company.

Q And you are the principal owner of the Chesley Tow Boat Company?

A Not the principal owner, only one of them.

Q Are you acquainted with the tug “Argo”?

A Yes.

Q That is owned by the Pacific Tow Boat Company, is it?

A Yes, sir.

Q And was built by them?

A Built by the Chesley Tow Boat Company.

Q By them?

A Yes, sir.

Q Was that built under your supervision?

A Yes—that is, I had her built.

Q Did you supervise the construction of this boat?

A No, not exactly; I had men to do that.

Q Yes, and you were in charge of the construction of that boat?

A Yes.

Q You are familiar with the manner in which this boat was constructed, are you, Mr. Chesley?

A Well, in a general way.

Q Yes; and you are familiar with the plan of the boat?

A Yes, in a general way only, however.

Q And after the boat was completed you were upon her many times, were you?

A Yes.

Q And observed her?

A Yes, sir.

Q Do you know what there was in the way of a passageway around the engines and crank pit?

A Well, I know that there was a passageway there, yes, sir.

Q What was this used for?

A Well, for going past the engine, to attend to any of the machinery which was abaft of the engine.

Q Used by the employees?

A Yes.

Q And this would include the fireman, would it?

A Yes.

Q Working on the tug?

A Working on the tug.

Q Now, do you know what there was constructed or maintained upon this passageway, if anything, in the way of a guard for the protection of employees or persons using it?

A You mean in regard to the engine?

Q Yes?

A I know there was a guard put up there.

Q That was?

A At the time she was built.

Q For what purpose?

A To protect persons from falling into the machinery and crank pit.

Q Crank pit?

A Yes, from stepping in.

Q Now, what knowledge have you of the installation of this guard?

A As to the detail, none, any more than to have seen that it was there.

Q As to any part of it, what knowledge have you?

A Nothing more than to see this guard of iron along there.

Q What, if any, directions did you give for placing a guard there?

A I gave directions for the people constructing the boat to have something put there.

Q What was the necessity for having any guard there?

MR. BYERS: We object to this as it calls for a conclusion of the witness and it has not been shown that the witness possesses any qualifications or any knowledge whatever with respect to machinery and he has not been qualified as an expert witness.

MR. FULTON: Just answer the question, Mr. Chesley.

WITNESS: What was the question?

Q What was the necessity, if any, for having this guard?

A To prevent someone from falling into the machinery or crank pit.

Q Without a guard there, Mr. Chesley, what, if any, danger was there of persons using that passage-way of falling into this crank pit?

MR. BYERS: Same objections, for the same reasons.

A The reasons why I gave instructions to put one there was that a man possibly might slip in there, and I like to make it as safe as possible around engines.

Q What was necessary, in your opinion, to make that passageway reasonably safe for persons or employees using it?

A Well, something alongside of the engine there.

Q This guard?

A Yes, a guard.

Q Well, the guard was necessary—

A Well, I—

Q In your judgment?

A I consider it would be safer to have one there.

Q Yes; without a guard, what danger was there, if any, of persons slipping and falling into the crank pit?

A There was danger of it.

Q Yes; Mr. Chesley, you are familiar with boats, are you—tow boats?

A Somewhat.

Q And their construction?

A Somewhat.

Q And you have been engaged in that business how many years?

A Fifteen or eighteen years.

Q In the tow boat business?

A Yes, sir.

Q And during that time you have had occasion to operate boats?

A Yes, sir.

Q And to be upon them?

A Yes, sir.

Q And become familiar with their construction and their different parts?

A In a general way.

Q And you worked upon them and operated them?

A I have been upon them when they were operating them.

Q Yes; and at the present time you are engaged in the tow boat business?

A Yes, sir.

Q Now, after giving directions that a guard be placed upon this passageway, what, if anything, did you do towards seeing that it was placed there?

A Nothing any more than that I saw one there.

Q You saw one there? Did you make an examination of it?

A I did not.

Q And you saw that that guard was there before the boat was pressed into service?

A About that time.

Q Yes; and you made no examination to ascertain the manner in which it was placed?

A No, sir.

Q Or to see whether it was securely placed or not?

A No, sir.

Q You simply assume that it was securely fastened?

A Yes, sir.

Q That was how long previous to the 22nd of November, 1910, Mr. Chesley?

A Well, it must have been about four years, I should think. I think the boat is about four years old.

Q This guard was constructed of sheet iron, fastened to the inside of the uprights or standards of the engine?

MR. BYERS: We object to that because it is a leading question.

Q You don't know how the guard you speak of was fastened?

A No, sir.

Q Nor do you know what it consisted of?

A Not any more than a piece of iron.

Q Now, do you know—you say you do not know the manner in which it was fastened to the standards?

A No, sir.

Q Whether it was loose or whether it was secure—you don't know?

A I don't know.

Q Mr. Chesley, assuming that this guard was not fastened, that the bottom of it was not fastened, so that it was loose and would yield—what protection would it afford—

MR. BYERS: Just a moment—

Q (Continued) —to persons walking upon the passageway?

MR. BYERS: We object to that question because it is calling for a conclusion of the witness as an expert, and expert qualifications have not been shown.

MR. FULTON: Just answer the question. Assuming that the bottom of the guard was loose and that it would yield, what protection would it afford to persons upon the passageway or using the passageway?

A It would afford some protection, possibly not as much as it would if it was fastened at the bottom.

Q What would there be to prevent a person from stepping into the crank pit, or a person's foot going into the crank pit?

A If he should place his foot in a certain way there, it might possibly go through to the bottom.

Q Would you consider a guard that was left loose at the bottom so that it would yield, and not fastened at the bottom, a protection to persons going upon that passageway?

MR. BYERS: We object to that question for the reason that it calls for a conclusion of the witness.

A It would be some protection.

Q Do you consider it an adequate protection?

A I would consider it more of a protection if it were fastened at the bottom.

Q If the guard along that passageway was left loose at the bottom so that it would yield, what

would there be to protect one from being thrown into the crank pit?

A It would be the top of the guard that would prevent the person from going into the crank pit. They might possibly put their foot through at the bottom.

Q Yes; with the boat lurching and swaying because of rough weather, what liability would there be of one's foot going into the guard and into the crank pit because of the guard's loose, unfastened condition at the bottom?

A There would be a liability of that accident happening, if they should step or slip near the bottom of the guard.

MR. FULTON: I think that is all.

CROSS-EXAMINATION.

BY MR. BYERS:

Q Mr. Chesley, you are not an engineer, are you?

A No, sir.

Q You have never constructed an engine or operated one?

A No, sir.

Q You are not a master or licensed master of a vessel?

A No, sir.

Q You have never operated or commanded a vessel?

A No, sir.

Q You were the manager of the Pacific Tow Boat Company?

A Yes.

Q Some little friction arose with regard to your management, didn't there?

A Yes, sir.

Q And you are more or less unfriendly to the Company, since you ceased to be manager?

A No, not necessarily.

Q Not necessarily—but is that a fact?

A No, sir.

Q Is it not a fact?

A No, sir.

Q You are still friendly to the company?

A I don't quite understand how you mean that. I have no business with them because I was put out from there.

Q Well, do you entertain any hostile feeling or enmity or ill-will towards the company on account of that?

A No, sir.

Q Then you do feel as friendly as ever to the company?

A Yes, so far as the company is concerned.

Q So far as the company is concerned. Then, Mr. Chesley, you had a talk with Mr. Fulton about your testimony before you came in; you volunteered to tell him what you knew about the boat?

A No, sir.

Q But yet you did tell him, didn't you, all you could about this?

A I answered his questions that he asked me.

Q And you volunteered to come here and testify?

A He asked me if I would come.

Q Well, you volunteered to do it?

A Yes, if that is volunteering.

Q Now, you say that this boat was built under your instruction about four or five years ago?

A Yes, sir.

Q And this guard was put up?

A A guard—I did not say *this* one. I do not know what guard is there now.

Q You do not know whether it was the same one that was put up at the time you put it there or not?

A No, I don't.

Q How long did you continue to manage the vessel after its construction?

A In the neighborhood of three years.

Q Was it the same guard that was put up at the time of the construction of the vessel that was there at the time you ceased to be manager?

A So far as I know. I could not say positively.

Q What is your best judgment of that?

A I think it was.

Q What is also your best judgment as to the fact of whether it was the same one or not, at the time of the accident?

A I don't know.

Q Was the one that was put up at the time the vessel was constructed, fastened at the bottom and top, both?

A I don't know that.

Q As a matter of fact, Mr. Chesley, this guard

that in this boat is constructed of sheet iron, is in a great many boats made of canvas, isn't it?

A I never knew one to be.

Q Well, you have been on quite a number of tug boats, and you know what kind of an engine a 1-A fore and aft compound engine is. Did you never see this so-called guard on a fore and aft compound constructed of a piece of canvas that went from the standards of the engine?

A Not to my knowledge.

Q Now, then, what is contained in this crank pit?

A It is the main shaft and connecting rod principally.

Q The connecting rod is the rod that leads from the piston to the crank shaft?

A Yes.

Q Now, that connecting rod is fastened to the crank shaft, how?

A Usually by a strip going around the crank shaft, and coming up and the connecting rod is bolted to it.

Q Then that leaves a projection on one side of the crank shaft?

A Yes.

Q And on the other side of that projection what is there?

A On the opposite side of the crank shaft?

Q Opposite to this fastening which you have described, what is there on the other side of the crank shaft?

A Well, I would not think there would be anything opposite to that fastening. Sometimes there is a balance on the opposite side.

Q Now, this counter-balance and what you say is the fastening between the connecting rod and the crank shaft, make practically two large spokes that revolve in the crank pit?

A As it balances on one side and the offset in the shaft would be opposite to it.

Q Yes; now this revolves in that crank pit?

A Yes, sir.

Q Now, how rapidly did this engine turn it when it was going at full speed?

A I presume at 110 to 130 revolutions.

Q So that in that crank pit it is how wide fore and aft of the boat?

A Fore and aft of the boat?

Q How wide is each crank pit?

A I should judge possibly 24 inches or such a matter.

Q Yes; now, in that crank pit there is revolving a crank shaft with its projection and the counter-balance on the other side so it makes a heavy mass of iron turning in that crank pit twice the number of the strokes of the engine?

A Yes.

Q So it will be revolving when it is going, say, full speed at the rate of 240 to 260 revolutions a minute?

A Possibly. I am not versed in those things.

Q Then the connecting rod and this counter-

balance and the crank shaft are all in plain view of one working about the engine?

A Yes.

Q And are revolving about the rates at which you describe?

A Yes.

Q Is it not plain to anyone that if his foot or any portion of his body gets in there it will be crushed?

A Yes, sir.

Q Now, as far as you know, Mr. Chesley, this so-called guard was still the same at the time of the accident as it was when the boat was built? So far as you know?

A Yes.

Q And this boat has been inspected at each annual inspection by the inspectors of hulls and boilers?

A Yes.

Q At least one a year?

A Yes, sir.

Q It was also inspected as complying with the rules of the United States for the governing of steam vessels, immediately after the time it was launched?

MR. FULTON: Objected to on the ground that it is inconsistent, and immaterial whether it was inspected or whether it was not.

A Yes, sir.

Q You know, as a matter of fact, that it was inspected?

A Yes.

Q And you know that it passed inspection?

MR. HALL: I object on the ground that it is wholly immaterial whether or not it was inspected.

Q As to the mechanical operation of the boats, you did not interfere very much with them, did you?

A No, sir.

Q The management of this was left to the engineer and fireman?

A Yes, sir.

Q The fireman in his duties—you know his duties, don't you, Mr. Chesley?

A Somewhat; yes, sir.

Q Well, it would be his duty to work around this engine, wouldn't it?

A Yes, sir.

Q To oil the bearings?

A Yes, sir.

Q And keep the fires going and in general to assist the engineer?

A Yes, sir.

Q So he would be constantly working around this engine?

A He would.

Q And consequently he would know as much or more about it than you would?

MR. FULTON: I object upon the ground that it is not proper cross-examination and upon the ground that it is incompetent, irrelevant and immaterial and calls for a conclusion of the witness.

MR. BYERS: Now, you may answer Mr. Chesley.

A About the detail of the engine.

Q In the bottom of this crank pit what collects, if anything, do you know?

A Water and oil.

Q Grease and dirt?

A Yes.

Q Now, this crank shaft and counter-balance revolving in that crank pit frequently strikes that water and oil?

A Yes.

Q And consequently has a tendency to throw that in a stream around the boat?

A Yes, sir, somewhat.

Q Now, this guard that you have put up there, is it not for the purpose of keeping that oil from being smeared on the sides of the boat?

A I ordered one put up there for the safety of the people.

Q Is it not for that purpose?

A Put up for the purpose of making it safe there.

Q Now, do you say it is not put up for the purpose of keeping the oil from being thrown on the sides of the boat? Is it or is it not?

A Not for that purpose.

Q Was not put up for that purpose at all?

A No.

Q And that is not the purpose for which this is constructed in other boats as well as this one?

A It might be in some boats.

Q Would not this boat with engine of this type throw that oil just as much as any boat, probably?

A Probably.

Q Then did you not intend to have anything to keep it from splashing over the boat?

A Lots of engines don't have it around there; this engine I ordered it around for safety.

Q Then what did you have constructed in this boat to prevent that oil from being splashed over the boat?

A Nothing.

Q Nothing?

A Nothing at all.

Q You intended to just let it splash?

A That was not taken into consideration.

Q Not at all?

A Yes.

Q Now, because you did not take it into consideration, do you know whether it was taken into consideration at all or not?

A I do not.

Q This boat and its engine are constructed and installed practically the same as all other boats of that type?

A Yes, practically the same.

Q And isn't this splash pan or guard placed in there practically the same as in all other boats of her type?

A No; each engine might be constructed a little different to that.

Q I am not alluding to just a little difference. I say practically the same as other boats of her type?

A I don't know as to that.

Q You don't know as to that? Don't you know that all other boats or practically all other boats of the type of this one have a splash pan constructed in practically the same manner as this so-called "Guard" in this boat, to keep oil from being splashed over the engine room?

A No.

Q Can you tell me any other boats of the type of this one that don't have splash pans or guards constructed to keep the oil from flying over the room?

A Yes.

A Just name one?

A We have the "Tempest."

Q She has a fore and aft compound engine?

A Yes.

Q And does not have anything to keep the oil from flying over the room?

A It may.

Q There would not be oil all around there if a pan of this character was constructed to keep it from flying around there?

A There would not be as much.

Q Would there be any, as a matter of fact?

A Yes, I think so.

Q You think so?

A Yes.

Q All other boats of this character have a passage way around the engine, to go to the rear of it, don't they?

A Usually, yes.

Q Well, as a matter of fact, they have to haven't they?

A Yes, sir.

Q And it is practically the same as the passage-way around this engine?

A In small boats it is not always as clear as this one is.

Q Not always as clear?

A Small boats might have larger ones.

Q The smaller the boat of course the smaller the passageway?

A Yes, sir.

Q You are now, Mr. Chesley, running a business, boat business in opposition to the Pacific Tow Boat Company, aren't you?

A I don't know whether you would call it in opposition or not.

Q Another tow boat business?

A Yes, another tow boat business.

Q And you have been ever since you ceased to be connected with this company?

A Yes, sir.

Q On your cross-examination you stated once that you did not feel enmity 'to the company as such' I think were your words?

A Yes.

Q What did you mean by that?

A That I had no ill-feeling against the company itself. I presume that you were drawing out that I had some enmity so that I would testify to their disadvantage or try to.

Q Well, I surmised that when you say that you had no enmity toward the company itself that you had enmity toward someone else.

A I might have some ill feeling toward the people who put me out.

Q Yes; the people, are the present manager of the Company?

A Yes, sir.

MR. BYERS: That is all.

RE-DIRECT EXAMINATION.

BY MR. FULTON:

Q Mr. Chesley, the fact that you may feel unkindly towards certain persons whom you consider as responsible for your being put out of the Pacific Tow Boat Company does that have any influence or effect upon the evidence that you are giving in this case?

A No, sir.

Q Your Company, you say, the Chesley Tow Boat Company owns stock in the Pacific Tow Boat Company?

A Yes, sir.

Q How much?

A They own 80,000 par value.

Q What is the capitalization of the company?

A \$125,000.00.

Q And the Chesley Tow Boat company owns how much?

A \$80,000.00.

Q Now you refer to having been put out of the Pacific Tow Boat Company,—who put you out?

A You mean—

Q How did they do that?

A Voted me out of the management.

Q That is, others got control of the company and they voted you out of the management?

A Yes, sir.

Q Previously to that time you had been manager and director of the company?

A Yes, sir.

Q Now, Mr. Byers asked you if you did not voluntarily seek to testify in this case,—you were seen by me, were you not, at your office down at Pier,—what—Grand Trunk Dock?

A Grand Trunk Dock, yes sir.

Q And I came there and asked you concerning the facts that you have testified to in this case?

A Yes, sir.

Q Did you volunteer to testify?

A No, sir.

Q Was that the first intimation that you had had that you would be called upon to testify?

A Yes, sir.

Q When you saw me there at the dock, and when I questioned you concerning this case?

A Yes, sir.

Q And you came here because you were notified

by Messrs. Higgings, Hall and Halverstadt and myself that this afternoon had been fixed for the taking of your evidence before Judge Totten?

A Yes, sir.

Q That is why you are here?

A Yes, sir.

MR. FULTON: That is all.

RE-CROSS-EXAMINATION

BY MR. BYERS:

Q You gave them to understand or made them believe that you came here as a friendly witness, however?

A No more than to speak what I knew about it.

Q But from what you did speak to them you gave them to understand that you were a friendly witness?

MR. FULTON: I object on the ground that that is not proper re-cross-examination.

A No sir, no more friendly than towards the other side.

Q No more friendly to the petitioner than libellant?

A No, sir.

MR. BYERS: That is all, Mr. Chesley.

RE-RE-DIRECT EXAMINATION.

BY MR. FULTON:

Q You are simply trying to tell the truth, Mr. Chesley, as you understand it?

A Yes, sir.

MR. FULTON: That's all.

(Witness excused).

DR. F. R. UNDERWOOD, produced as a witness on behalf of the Claimant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. HALL:

Q You may state your name?

A F. R. Underwood.

Q What is your profession?

A Physician.

Q Where are you engaged in the practise of your profession?

A In the Leary Building.

Q Seattle?

A Seattle.

Q Do you know the claimant, Iver Nordstrom?

A I do.

Q You attended him, did you not?

A I did.

Q When did you commence attending Iver Nordstrom?

A November, 1910.

Q Where?

A Providence Hospital.

Q What condition was he then in, Doctor?

A His leg below the knee was smashed and torn,—the bones of the leg broken and the bones of the foot broken; suffering a great deal of pain.

Q Was an attempt made to save the leg?

A Yes.

Q What did you do to save it?

A Why, we tried to save it,—as much of the leg as possible,—possibly all of it, and it was thoroughly cleansed and dressed, drains placed in the torn places, the bones placed in position, the whole surrounded by temporary splints, and daily dressings made thereafter.

Q Were these daily dressing such that they gave Mr. Nordstrom pain?

A A great deal; very painful.

Q How long did that continue, Doctor, to the best of your recollection?

A We amputated the leg in February, 1911, and previous to that time he was on the operating table probably two or three times for the purpose of opening up the pockets of pus that had formed in the leg. After the amputation of the leg there were other drains to be placed in the stump, and it even affected the meat so that he was on the operating table possibly four or five times.

Q What would you say as to his suffering pain all during this time?

A He suffered a great deal of pain. He bore it very bravely, but on every occasion of the dressing there was quite a great deal of pain as it was necessary to raise the leg, and the calf tissues were honey-combed with this pus and dead tissue so that, altogether, he was quite a sufferer.

Q Do you remember how long he stayed in the hospital after the operations?

A He was discharged in June, 1911.

Q And the operation took place in February, 1911?

A Yes, sir.

Q Are you the regular U. S. Marine Doctor here?

A I have been connected with the marine service here for seven years.

Q And you treated him because he was a sailor?

A Yes.

Q Which leg was it, Doctor, that was—

A His left leg.

Q And where was it amputated?

A It was amputated at the joining of the upper and middle third of the left leg.

Q Where would that be with reference to the knee? How far below?

A Why, about 6 inches I should judge, below the knee.

MR. HALL: That is all.

CROSS-EXAMINATION.

BY MR. BYERS:

Q The knee was not injured,—that is, it is not injured now?

A No.

MR. BYERS: That is all.

RE-DIRECT EXAMINATION.

BY MR. HALL:

Q But it was infected,—the knee?

A Yes, the tissues.

Q You have received full remuneration for your services?

A The Government paid me.

Q And paid the hospital bill, I understand?

A Yes.

MR. HALL: That is all.

(Witness excused.)

IVOR NORDSTROM, the Claimant herein, being first duly sworn, testified in his own behalf as follows:

DIRECT EXAMINATION.

BY MR. HALL:

Q Your name is Iver Nordstrom?

A Yes.

Q You are the claimant herein?

A Yes.

Q What is your age?

A Twenty-one years.

Q When were you twenty-one years old?

A 29th of September, 1911.

Q Where were you working November 22nd, 1910?

A On the 'Argo.'

Q Who was the owner of the 'Argo?'

A The Pacific Tow Boat Company.

Q How long had you been working there?

A From the 15th of October to the 22nd of November.

Q 1910?

A Yes.

Q When you were employed there, what were you doing?

A I was employed as fireman.

Q But what were you doing?

A I was firing and oiling.

Q What experience had you before in firing?

A Well, I had been in saw mills and on donkeys.

Q Were you ever employed on a boat before as fireman?

A Never. Just on the tug.

Q Well, had you ever worked on a boat before as fireman or oiler?

A Never.

Q You were injured November 22nd, 1910?

A Yes.

Q State what you were doing at the time you were injured?

A Well, I was oiling the parts of the machinery and the boat was rolling quite a bit, and I slip with my left leg against the lower part of the guard and it gave away and let my foot go into the crank pit.

Q What happened to your foot then?

A Well, it got mixed up with machinery and got crushed.

Q What caused it to be crushed?

A The crank.

Q The crank hit it?

A Yes.

Q Did you make an effort to pull your leg out of there?

A Yes, I tried.

Q What, if anything, prevented you from doing it?

A The guard cut into my foot when I pulled; it held it in there.

Q The guard held your foot in there?

A Yes.

Q How did you finally get it out?

A When I called for 'stop' and they stopped the engine I kicked with my right foot against the guard and pulled it out.

Q When you pulled it out, what was its condition?

A Well, it was all smashed up.

Q When your foot was injured, what effect did the revolving cranks have on it, that is, as to pulling it further in?

A Yes, they pulled it down underneath the cranks.

Q It did?

A Yes.

Q If the guard had not caught your foot and held it, could you have pulled your foot out?

A I think so.

Q Where were you taken then, Iver?

A I was taken to Seattle then and up to the Providence Hospital.

Q How long were you in the hospital?

A I was in the Providence one hundred and ninety-nine days and in Port Townsend thirty days.

Q Do you remember when your leg was amputated,—about what time?

A Not exactly. About I think eight and a half weeks after I came into the hospital.

Q Did you suffer pain during this time?

A All the time.

Q Was,—how was it,—severe pain?

A They were hurting bad.

Q Were you delirious on account of it?

A No, but my fever was high.

Q Were you able to sleep at night?

A Very little.

Q Then as I understand you, you were suffering pain all the time there?

A Yes.

Q What was done to your leg from time to time?

A Well, they done a couple of operations and then they dressed it every day.

Q Did it hurt you while they dressed it?

A Awful.

Q After the leg was amputated, were there any operations performed?

A Yes.

Q What was done to it?

A Some skin was put underneath of the knee and the end of the bone was trimmed over a bit.

Q Did those operations cause you pain?

A Yes.

Q Have you been able to do anything toward working since then?

A No; not at all.

Q Has it been necessary for you to use crutches to walk?

A Yes.

Q Do you still use them?

A Yes.

Q How has your general health been since then?

A Well the leg has not been feeling very well and I have been feeling sick and weak.

Q Do you still suffer pain from the leg?

A Well, sometimes it hurts a little.

Q Before this accident were you able-bodied, I mean by that, were you crippled at all?

A Not at all.

Q What was your condition as to health?

A I never was sick before I had this accident.

Q How much were you earning a month?

A Forty dollars and board.

Q Forty dollars and board. Did you ever earn more money than that?

A Yes.

Q Where?

A In a saw mill.

Q What were you getting there?

A I could make pretty near \$80. per month, but I had to board me there.

Q You made \$80. and you had to pay your board out of that?

A Yes.

Q Where were you born—?

A In Sweden.

Q How long have you been in this country?

A Two years and seven months.

Q Now?

A Yes.

Q You had been here how long when you were hurt?

A I had been here 1 year and 4 months, something like that.

Q Where were you when you got hurt,—I mean, where was the boat that you were on?

A The boat was about close to Edmonds.

Q On what trip was it,—where was it coming from and going?

A We had come over there to get some gravel scows, a little place close to Edmonds—

MR. BYERS (Interrupting) He means Richmond Beach.

A (Continued) Richmond Beach, yes, and was returning to Seattle.

Q And you were hurt on the return trip?

A Yes.

Q What was the condition of the weather?

A It was very heavy weather.

Q Was the boat rolling?

A Yes.

Q Was it rough?

A Yes.

Q What time did this accident happen?

A About ten o'clock in the evening.

Q Ten o'clock in the evening?

A Yes.

Q How did that guard give way?

A Well, when I fell against it, it gave away on the bottom like a door giving away, going open.

Q When you fell against it?

A Yes.

Q It gave way at the bottom?

A Yes.

Q Was it fastened at the bottom?

A I don't know, but I don't think so. It gave way.

Q It gave way as though it was not fastened at the bottom?

A Yes.

Q Did the top give way?

A No.

Q The top was still fastened?

A Yes.

Q And the bottom gave way?

A Yes.

Q Do you remember seeing the guard at that time after you were injured, while you were lying there or trying to get out, could you see whether it was fastened at the bottom?

A No, I could not see anything, I was in too bad condition,—I did not know where I was hardly.

Q Where you kicked against it with the other foot to get your left leg out, was it fastened at the bottom or not?

A I could see that I could press it enough in, for to get my foot out.

Q That is, you could press the bottom of the guard in toward the crank pit so as to release your other leg?

A Yes.

MR. HALL: That is all.

CROSS-EXAMINATION.

BY MR. BYERS:

Q Iver, when you went there to get work from the Pacific Tow Boat Company you made application for a job as fireman, didn't you?

A Yes.

Q You told them you could fire a boat, did you?

A No.

Q You didn't?

A No.

A Well, how did you expect to get a job as fireman if you could not fire a boat?

A They asked me—"can you fire" and I said "yes, I think I can."

Q And you said you had worked before that time on deck?

A Yes.

Q How long did you work on deck?

A I worked one month on the Columbia River and then I worked about a couple of months around Seattle here.

Q On what boat did you work at Seattle here?

A The freight boat Dredger, and the Fidalgo.

Q Those boats belong to the Star Steamship Co.?

A I don't know.

Q You worked on the deck there?

A Yes.

Q Now, you went and hired to the Pacific Tow Boat Company as fireman?

A Yes.

Q And that was about the 15th day of October?

A Yes.

Q Now, as fireman, you went down into the engine room immediately?

A Yes.

Q And your duties kept you in this engine room all the time?

A Yes, on my watch.

Q Yes; and you were oiling the engine?

A Yes.

Q That was part of your work?

A Yes.

Q And you had been oiling this engine at the time of the accident for about six weeks from the 15th of October?

A Five weeks, something like that.

Q In doing that oiling you would necessarily lean over or be against this plate which you call a guard every day?

A Yes, I was standing close to it.

Q Your duties called you all around it, before it and around it and on both sides of it?

A Not on both sides, only one side.

Q You would go around on the port side of the engine sometimes?

A Very seldom.

Q Wouldn't you go around there to see the circulator, etc.?

A Just for a moment sometimes.

Q So you were working in close proximity or close to that place where you were hurt, during all those 5 weeks or better?

A Yes.

Q If there was anything wrong with that guard you would have noticed it?

A No, I might not.

Q Why couldn't you see it?

A Well, if the guard was not alright, it looked alright to me.

Q The guard was alright looking to you?

A Yes.

Q And you could see it all the time. It is in plain view, there is nothing to hide it, is there?

A Well it is a little below the floor, and inside of the column and it's a little dark down there, too.

Q And you knew that it was inside the column all the time?

A I could see it was.

Q Now, you worked on the Dredger and Fidalgo here, on deck. What was the name of the boat on the Columbia River?

A I don't remember.

Q That was a steamboat, was it?

A Yes, a speed boat.

Q Did the Dredger and Fidalgo both have fore and aft compound engines just the same as this?

A I don't think so.

Q You don't think so; what saw-mills did you work in?

A One mill at,—in Falls City.

Q What were you doing there?

A I was working in the night time.

A What were your duties?

A I had to keep the steam up for the dry kiln.

Q Working around the boilers as fireman?

A Yes.

Q And you had worked on donkey engines?

A Yes.

Q How long did you work in this saw mill?

A I worked there about one and a half months anyway.

Q About one and a half months anyway,—and then how long did you work on this donkey engine?

A Three or four months.

Q Then practically all the time, Iver, since you came to this country, you had been working around engines and boats, that is, practically all the time?

A Most of the time.

Q Now, Iver, you know about how fast that piston moves up and down there in that crank pit?

A Not exactly.

Q Well, does it move very fast or slow?

A Well, pretty fast.

Q Yes; pretty fast. Now, as a matter of fact, Iver, you could not stick your hand in that crank pit

and draw it out and not have it struck when that vessel is going at full speed?

A No, I don't think so.

Q Now, the crank shaft with the fastenings and the counterbalance runs so fast that it just looks about like one solid piece, doesn't it, to the eye,—one solid piece?

A I don't know just exactly how it looks, but—

Q Well, Iver, if you had stuck your foot in there whether there was a guard or whether there was not, it would have torn your foot off?

A Yes.

Q And it wouldn't make any difference whether there was a guard there or not, that would have happened?

A Well, if there had not been a guard there and I had fallen in there, I would have been caught altogether.

Q You say that vessel was rolling pretty heavy that night?

A It was.

Q Was it more than just an ordinary storm?

A More than there was ever when I was on board.

Q Yes; and it was in a lurch of the vessel that you fell in?

A Yes, my foot.

Q And you would not have fallen if it had not been for that lurch?

A I don't know.

Q Did you fall down?

A No, I just slipped.

Q What did you work at in the old country, Iver?

A Well, I was on the farm most of the time.

Q Did you ever work in saw mills or around engines or anything of that kind in the old country?

A No.

Q You are now in your twenty-second year?

A Yes.

Q Your leg, aside from the fact that it is crippled, your leg is pretty well recovered, isn't it?

A What do you mean?

Q I mean that, for instance, your leg is so that you can have an artificial leg put on and you can use it quite a good deal.

A Not yet.

Q After a while?

A Well, I was at the leg maker and he told me I would never be good.

Q The leg maker told you that?

A Yes.

Q The Doctor says it will be good?

A No; I tried to wear an artificial leg but it broke up so soon.

Q I believe that is all.

RE-DIRECT EXAMINATION.

BY MR. HALL:

Q Iver, now if it had not been for this guard catching hold of your leg, could you have gotten

your foot out of there without being so badly crushed?

MR. BYERS: I object to that as leading, suggestive, and calling for a conclusion of the witness, and not tending to elicit the facts.

MR. HALL: State what effect the guard holding your leg had on your foot being smashed?

MR. BYERS: Objected to because it assumes a condition contrary to the facts.

MR. HALL: Answer that.

A I think I could have got my foot out.

Q You think you could have gotten it out without its being so badly crushed?

A I think so.

Q Did your duties,—how much of your time, while you were on duty, did your work take up there?

A Well, all the time, where we were running.

Q That is, while you were on duty?

A Yes.

Q If you were not firing you were oiling?

A Yes.

Q And did that keep you busy all the time?

A Yes, it did.

RE-CROSS EXAMINATION.

Q And the principal parts of your oiling was right around this crank shaft and pistons?

A Yes, around the moving parts.

Q And those are the moving parts?

A Yes.

MR. BYERS: That is all.

RE RE-DIRECT EXAMINATION.

BY MR. HALL:

Q Was there anything to call your attention to the fact that the guard was not fastened at the bottom?

MR. BYERS: I object and move to strike.

Q Did you know that this guard was not fastened at the bottom?

A I did not.

Q Did you know that it would have given away if your foot went against it?

A No, I didn't.

MR. HALL: That is all.

(Witness excused)

THOMAS F. OSSINGER, produced as a witness on behalf of the Claimant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. FULTON:

Q State your name.

A Thomas F. Ossinger.

Q What is your business?

A Engineer.

Q What experience have you had in around the Sound here on boats?

A On the Sound? I have been on the Sound ten years.

Q Have you been on all sorts of boats?

A All kinds.

Q Are you familiar with the Argo, the tug Argo?

A Familiar with that class of boats.

Q What license, if any, do you hold?

A License? Chief Engineer's marine license.

Q How long have you held that Chief Engineer's license?

A Two years.

Q You say you have been employed for the past ten years on the Sound on boats?

A Yes, sir.

Q In what capacity?

A Everywhere from junior engineer to chief engineer.

Q Assuming that in the tug "Argo" there is a crank pit, the bottom or bed of which is about two inches lower than the platform or deck, is any—and that there are in this crank pit two columns, one of high pressure and one of low pressure, and to one side of said crank pit for the use of employees in getting around the pit, there is a passage way, and on that same side there are three columns, state whether or not—what in your opinion, if anything, should there be there to protect the employees and keep them from falling into the pit?

A There should be a guard between the col-

umns, between the center column and each end column. There would be two crank pits instead of one.

Q There should be a guard in front of each pit?

A Yes.

Q How should that be constructed in your opinion? What should it consist of?

A Why a light cast iron—light sheet iron about one-sixteenth of an inch thick.

Q Fastened where, Mr. Ossinger?

A If I were putting it in, I would fasten it to the bed plate on the bottom, the top would be fastened to the columns.

Q On what side of the column should it be placed?

A On the outside, of course.

Q That is the side away from the crank pit?

A Yes sir.

Q Have you worked on tugs similar to the Argo?

A No, not tugs, I have worked on small boats.

Q You are familiar with this same class of construction and have worked on vessels of the style of construction?

A Yes sir.

Q What, if anything, is customary to have to protect employees from falling into the pit?

A It is customary to have a guard similar to one I have just described, that guards the face of the engine.

Q Why is that necessary?

A Why is it necessary?

Q Yes, why is it?

A Well an engineer or oiler in course of his work is called on to get close to the machinery, and on any kind of a run one has to get in near it and also to oil the journals in the center of the pit, and if the boat is rocking and no guard there, a man would be in pretty hard shape.

Q What would be the danger there?

A Danger of getting into the crank pit.

Q Mr. Ossinger, assuming that there was a guard in front of the low pressure crank, and that guard was made of sheet iron about one-sixteenth of an inch thick, and that was fastened on the inside to the columns, through the columns at the top but not at the bottom, what—would that, in your opinion, be a proper guard?

A No, sir, it would not be any guard.

CROSS EXAMINATION.

BY MR. BYERS:

Q You say you have been working for about ten years—

A Longer than that on the Sound; ten years out of Seattle.

Q What boat are you employed on now?

A None.

Q Last employed on?

A Chippewa, Inland Navigation Company.

Q When was that?

A About a year and a half ago.

Q Where since that time?

A Pacific Coast Condensed Milk Company.

Q Pacific Coast Condensed Milk Company?

A Yes, sir.

Q You haven't been marine engineer for them?

A Stationary.

Q What was your position on the Chippewa?

A First assistant.

Q You were not chief on her?

A No.

Q How long?

A About two months.

Q For what reason did you quit there?

A Why did I quit?

Q Yes, sir.

A I don't know as that has any bearing on this case, but the ship was laid up.

Q The ship laid up? Where were you employed before that?

A

Q How long, about?

A About a year.

Q What was your license, for what size vessel?

A Chief engineer of Sound.

Q What tonnage?

A 750.

Q Not over?

A No.

Q Now, I want to know what vessel of the type of the Argo you have ever worked upon?

A The Inland Flyer.

Q The Inland Flyer, well, take the Inland Flyer, that is the Mohawk now, isn't it? Is there a guard

on her for the purpose of keeping or protecting the employees from falling into the crank pit?

A There was at the time I was on her.

Q You are sure of that?

A I am.

Q Don't you know, as a matter of fact, that there isn't and never was a guard on her such as you have described?

A I did not say there was one such as I described.

Q Do you know of one such as you have described on the Inland Flyer or the Mohawk?

A I did not say there was one such as I described.

Q Don't you know, as a matter of fact, that there is one for the purpose of keeping oil from being splashed by the revolving cranks?

A No sir.

Q You don't? Now, what other vessels of the type of the Argo have you ever worked on?

A I don't know that I worked on any quite as small as the Argo. I have been on the boats of the Inland Navigation Company, the Flyer, Chippewa, Indianapolis, Iroquois—

Q Taking the Flyer, is there any guard on her, or ever has been on her, purposed or intended to keep any man from falling into the crank pit?

A Yes, sir, there is a hand rail.

Q I am not speaking of hand rails, I am speaking of guards such as we have been talking about. Now, is there such a guard on the Flyer?

A Not that kind of a guard, because there is a different kind of an engine; her bed plate is above the floor.

Q Did you ever see the bed plate in the Argo?

A No.

Q Now is there any vessel you know of on the Sound at the present time of the type of the Argo, or of approximately the type of the Argo that has guards such as you have described that is constructed for the purpose of preventing the employees from falling into the crank pit?

A I can not name any boat that is built in exactly that way, but they all have some kind of guard to keep a man from falling into the crank pit.

Q That is your statement unqualified?

A That is my statement.

Q You are willing to rest on that statement that they all have some kind of a guard?

A Yes, sir. The crank pit is not left open for a man to walk into.

Q Then you do not think that the columns or the bed plate or the steps to the casing in the cylinder form any guard at all?

A The cylinder on any kind of a boat is way above the bed, how can a man fall in there?

Q Now, as a matter of fact, in this particular boat that we are discussing, the cylinders are probably only not over forty-eight inches above the bed plate?

A About four feet.

Q Yes, less than four feet; three columns ex-

tend from the cylinder case to the bed plate. You don't think that would form any protection?

A Not any, not in that way.

Q Can you name any vessel of the size and type of the Argo at present running upon the Sound that has any other than these things that I have named to keep a man from getting his feet into the crank pit?

A No, I can't name—I can't name any particular one, not being familiar with the small tow boats.

Q Would you be willing to state there is one on the Sound?

A Yes, I don't think I would have any trouble in finding one.

Q But you can not name one?

A No.

Q You said you would fasten the bottom of this guard to the bed plate?

A Yes, sir.

Q I suppose you would have it rivetted?

A Fasten it with bolts, so you can take it off.

Q As a matter of fact it is necessary to take it off quite frequently?

A Yes, sir.

Q In some boats, such as the Monticello and the Florence K. they have the so-called guard just set or leaned against the columns, do they not?

A On the outside?

Q Sometimes on the outside, sometimes on the inside.

A I can't understand how they could lean it against the inside.

Q Sometimes have it leaned against the outside—

A Without fastening it at all? I have never seen that.

Q You have never seen that? When did you last examine the Mohawk?

A About sometime between one and a half and two years ago.

Q Did you notice how those guards were fastened at that time?

A There were hand rails about the bottom platform.

Q Is there any necessity in a man who is acquainted with the working of an engine where it is a small engine of the kind, getting his feet in the crank pit—

BY MR. FULTON: We object to that as incompetent cross-examination, and upon the further ground that it calls for the conclusion of witness upon a question that the Court must determine.

BY MR. BYERS:

Q —familiar with an engine; working around it; such as I have described, a small engine, against the top of which he can rest his hands—

A Why, a man coming alongside of an engine with the boat running in heavy sea would be apt to lose his balance and his feet slip in. It is possible for it to happen.

Q Did you ever hear of it happening in your experience?

A Not exactly in that way.

Q Did you ever hear of these pans—splash pans, and which you call guards, being put up there for the purpose of keeping the oil from splashing over the boat?

A Why, to a certain extent it would keep the oil from splashing over the boat.

Q Isn't that what it is intended to do?

A It would act as an oil splash to a certain extent.

Q Now, will you answer my question?

(Question read) Isn't that what it is intended to do?

A That is what I say, it would answer that purpose—

Q Is that the intention in putting it there?

A Yes, it is there as a guard, and would answer that purpose.

Q Isn't it there to keep the oil from getting thrown over the boat?

A You can turn it around, and put it that way, yes.

Q Now, sometimes it is made of canvas and tied with a string.

A I have never used any of that kind.

Q Your experience on boats has been quite limited, hasn't it?

A I don't think so.

Q You have never seen this splash pan, or guard as you call it, made of canvas?

A No sir.

Q You have never seen it where it was just set against the columns and not fastened in any way only with a little clamp—a tin clamp that just clamped over the column?

A O, clamp? Yes.

Q You have seen it that way? A little tin clamp—

A Tin clamp, or iron or steel clamp—

Q It was the thickness of tin.

A Heavier than tin.

Q But you have seen them where they have been set there without anything to hold them up?

A No sir, never.

Q If one were made of canvas, it would scarcely act as a guard, would it?

A I wouldn't suppose it would.

Q So that if one was placed there and made of canvas then its purpose or intention must be something less than to act as a guard, you would think so wouldn't you?

A I should suppose so, yes.

Q And if it only was set there and leaned against the columns, its purpose would be to act as something less than a guard, wouldn't it?

A With nothing holding it at all?

Q Nothing except gravity.

A That would be impossible for it to stand up there unless the ship was lying absolutely still.

Q And if only fastened by means of a clamp, just stuck there, that would necessarily be intended for something else than a guard?

A If that was put on the outside and clamped on the columns, that would be practically permanent if it was made heavy enough.

Q And if one was fastened at the top of the columns with U bolts and on the inside and on the bottom rested against the engine frame or bed, that would be intended as a splash pan and not as a guard, wouldn't it?

A It would not be safe as a guard, it might possibly be put up as a splash pan.

Q It would not be intended for a guard, would it?

A I wouldn't suppose any one would put up a guard that way.

Q You are working now for the Pacific Coast Condensed Milk Company?

A No, I am not working at all.

Q You are not employed at all?

A No.

JOHN S. WRIGHT, Produced as a witness on behalf of the Claimant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. HALL:

Q State your name.

A John S. Wright.

Q What is your business?

A Marine Engineer.

Q How long have you been marine engineer?

A I have held a license about twelve years, I think it is, 1900.

Q What sort of license do you hold?

A First assistant unlimited ocean; chief engineer lake, bay and sound vessels of 750 gross tons.

Q What sort of boats have you been employed on, Mr. Wright?

A Various kinds.

Q Are you familiar with the tug Argo?

A I am not.

Q Do you know the class of vessel that is admitted in?

A Why, from what I have heard—

BY MR. BYERS: We object to witness testifying to what he has heard.

BY MR. HALL:

Q Have you ever been employed on tugs on the Sound here?

A I have.

Q The Argo is a tug about 85 or 90 feet long and about—and of about 130 tons capacity, and had a beam of approximately 18 feet; the engine and boilers are forward, and there is a cylinder pit aft in which there is a high pressure crank and a low pressure crank; there is a passage way around the crank pit for the use of the employees in working around the pit; the top of the pit itself is about two inches lower than the floor of the deck; are you familiar with that class of boats, such as I have described?

A To a certain extent, yes sir.

Q Assuming that the crank pit is as I have described, and that there is a passage way in front of

it for the use of employees, what, if anything—and at the—and the bottom of the crank pit is two or three inches lower than the floor of the deck of this passage way, what, if anything, in your opinion, is necessary to have there to protect the employees and keep them from falling in or being thrown into the crank pit?

A The boats that I have been chief engineer on had guards or a shield made out of sheet iron about one-sixteenth of an inch thick.

BY MR. BYERS:

I object to the answer and move to strike it.

Q BY MR. HALL:

What in your opinion is necessary to have there to protect the employees of the boat using this passage way from being thrown into or falling into the crank pit, what is necessary?

A There should be a guard there.

Q In your opinion based on your experience, how should that guard be constructed?

A Out of material—either a pipe running across fastened to the columns longitudinally, or material made out of sheet iron one-sixteenth of an inch thick.

Q And how fastened?

A By a spring yoke rivetted into the sheet iron fastened to the column both top and bottom.

Q On which side of the column?

A On the outside of the column.

Q That is the side toward the passage way?

A Yes sir.

Q Based on your experience, you may state whether or not it is customary to have such guards?

A It is.

Q In your opinion, would a guard constructed—guard consisting of sheet iron about one-sixteenth of an inch thick fastened at the top to the columns on the inside, but not fastened at the bottom; is that a proper guard—is such a guard as I have described a proper guard.

A It is not.

Q For what reasons? Why is it not a proper guard, Mr. Wright?

A For the reason it is not fastened at the bottom.

Q Not being fastened at the bottom, what is liable to happen to the employees using the passage way?

A In case there should be any oil on the floor to make it slippery, one would be liable to slip into the pit, or if the boat were rolling, one would be liable to slip in also.

Q Is it customary on this class of vessels and other vessels of larger size to have guards in front of the crank pits?

A It is.

Q That is all.

CROSS EXAMINATION.

BY MR. BYERS:

Q Did you talk your testimony over with Mr. Hall before you came in here?

A Very little of it.

Q You told him how you would testify as to such questions as you have answered?

A Yes sir.

Q And he propounded this series of questions to you?

A Some of them.

Q And your purpose in coming here was to testify that such an equipment as the Argo had was not a proper equipment?

A Yes sir.

Q Although you had never seen the equipment the Argo had, and know nothing about it?

A Only what I had been told.

Q Now, what boat of the type of the Argo had you ever been employed upon?

A Steamer Major Guy Howard belonging to the United States Government at Astoria, Oregon, was one.

Q What is she, a tug boat?

A She is used for tug and passengers.

Q Used for tug and passengers? Used for tow boat same as any?

A Yes sir.

Q I am asking you what vessels of the type of the Argo—Is the Major Guy Howard of the type of the Argo?

A As far as the engine equipment is concerned I presume it is similar.

Q But you know nothing about it?

A From the description of others.

Q Where are you employed now?

A I am not employed at the present time.

Q How long has it been since you were employed?

A Second day of May, 1912.

Q Where then?

A First Assistant Steamship Alki, the North Land Steamship Company.

Q Now, what other vessels have you worked on besides on the Howard?

A On the steamers Santa Clara, Santa Anna—

Q And vessels of that type?

A —and the steamer Julia B.

Q These are all large vessels with the exception of the Julia B, with large engines?

A Yes sir.

Q Large open faces on the engines?

A Some of them have.

Q Now, from your knowledge of the Argo, what is the size that you are assuming is the opening on the face of this engine through which a man might fall into the crank pit?

A Please state that question again?

QUESTION READ: Now, from your knowledge of the Argo, what is the size that you are assuming is the opening on the face of this engine through which a man might fall into the crank pit?

A I could name the Julia B—

Q I am wanting to know the size of the opening on the face of this engine, you have never seen it, what are you assuming is its size?

A Of the steamer Argo?

Q Of the steamer Argo?

A About six or seven feet.

Q Six or seven feet what?

A Front of columns.

Q So then you are assuming that there is an opening six or seven feet square through which a man might fall—

A I don't know as it would be square; six or seven feet in length.

Q Well, what would be its head?

A I presume about five feet.

Q Now, you think if there is an opening of that size we have described, then that there ought to be a guard to prevent a man from falling in?

A Yes, sir.

Q Have you seen these appliances that you call a guard placed there for the purpose of keeping the oil from being whirled around the engine room?

A Yes, sir.

Q In fact, wherever you have a high pressure engine it is absolutely necessary, is it not, to put some kind of splash pan in front of the crank pit to keep it from throwing the oil all over the engine room?

A No, sir.

Q Did you ever see a high pressure engine that did not have a pan to keep oil from flying over the engine room?

A No sir.

Q Then I say it is necessary to have a pan to keep it from splashing over the engine room.

A Not absolutely.

Q I will withdraw the word absolutely and it would be a very disagreeable engine room to be in if that guard were not placed there?

A Yes, sir.

Q And that is the reason the pan is placed there, is it not?

A Not always.

Q That is the chief reason, however. In the bed plate of an engine, the columns come down in different portions of it in different engines?

A Yes, sir.

Q For instance, some bed plates the columns come down close to the inside of the plate and some they come down in the middle of the plates, such as I mark here (indicating) and some they come down near the outside of the bed plate, don't they? The column that comes down from the cylinder—

A Yes, sir.

Q I say they come down there at the middle or toward one end—

A On top of the bed plate, yes.

Q Now, we will assume our three columns coming down here, and this piece of paper which I have is the bed plate. (Indicating.) Now, inside of this bed plate is the crank pit; now, in a high pressure engine how fast does that crank revolve in a crank pit?

A That depends on the steam they carry.

Q What is the usual amount carried?

A That depends on the type of the boiler they are using.

Q What is the type of boiler usually used?

A There are two types, Scotch Marine and the pipe boiler.

Q Does it make any particular difference as to the speed of the engine?

A Yes, sir.

Q It does. Then we will take the Scotch Marine. If the engine, a high speed engine, about what—about approximately—is its speed?

A From 125 to 175 revolutions per minute.

Q In this crank pit all the oil and drippings from the engines collect—

A Unless there is an outlet in the crank pit.

Q It collects whether there is an outlet or not.

A It will not collect if it runs out.

Q Now, when that oil comes in there if there is no pan to prevent it the centrifugal force will throw it in a stream around the vessel?

A No, sir: not in a stream.

Q How will it throw it?

A It might go in drops.

Q And keep on going in drops until it has a mark around the engine room?

A No, sir.

Q And it will keep on in drops until it begins to run and splash, especially on the open side of the engine?

A The side of the boat is quite a ways from the

engine, and I have never seen an engine to splash to the head.

Q As a matter of fact you come back to the proposition that about a little boat of this kind you know very little?

A No, sir.

Q Now we come to the columns again. This pan to prevent the oil from splashing out, the oil comes against it, naturally, doesn't it, and if the engine bed or plate projects beyond the opening it will run out into the engine room, won't it?

A Yes, sir.

Q So that it depends upon where the column is in the engine room whether this splash pan is placed inside or outside the column, doesn't it?

A Not in my experience; no, sir.

Q If the pan—if the columns come down on the outside or near the outside of the engine room and the oil runs against it and it was put on the outside it would run into the engine room instead of running into the crank pit?

A Yes, sir.

Q So that where it is placed that way it would be necessary to have it act as a splash pan, to put the pan on the inside of the column, wouldn't it? If it is to act the purpose of the splash pan?

A No, sir.

Q Tell us how you would fix it?

A This splash pan is put on the outside, could be put—it could be brought around to the bottom

on top of the bed plate, and a longer pan to run it down on the inside of the crank pit.

Q That would make a very handy splash pan to remove when you are working with the crank shaft, wouldn't it?

A No, sir. It would keep the oil from running on the floor.

Q Tell me where you saw one of this type?

A On the Steamship Alki.

Q Still there now?

A Unless it has been taken away since the 2nd day of May, 1912.

RE-DIRECT EXAMINATION.

BY MR. FULTON:

Q Mr. Wright, if this guard were not fastened at the bottom it could not act as a protector from oil, could it, from the oil splashing, if it were not fastened at the bottom?

A It could.

Q Wouldn't the oil come through anyway from the bottom?

BY MR. BYERS: We object to this question because witness has already testified, and for the additional reason that the question is leading and suggestive.

BY MR. FULTON:

Q Didn't you state to me, to Mr. Hall and myself, that if this guard is not fastened at the bottom it would not act as a splash pan because it would not

wholly prevent the oil from coming out; the oil would come out whenever it was not fastened?

A I couldn't say that I made that statement.

Q Wouldn't it have that effect?

A That would depend upon how far down into the crank pit the guard ran.

Q You were asked what size opening you were assuming was upon the Argo and you stated you assumed about five feet; five to seven feet—

A I said about six or seven feet long, about five feet high.

Q Now, supposing it was only three or four feet, that would make no difference in—

BY MR. BYERS:

Objected to because it is leading and suggestive.

Q —assuming it was only three or four feet, what difference would that make?

A None.

Q A person would be just as liable to step into or get into an opening three or four feet as five or six feet?

BY MR. BYERS:

Objected to because it is leading and suggestive.

A No, I can't say as he would, for the reason that the space—the smaller the space the less risk you would run in throwing you into that space.

Q But in your opinion a guard would be necessary for that space, nevertheless?

BY MR. BYERS: We object to that because it is leading and suggestive.

A Yes, sir.

Q That is all.

RE-CROSS EXAMINATION.

BY MR. BYERS:

Q In an opening two by three if a man went to slip in he could very easily put his hands against the sides of the cylinders to brace himself against them?

A It depends how high the cylinders are.

Q Well, suppose they are only four feet from the floor, or four feet from the engine bed?

A He could.

Q And if these columns were, say, only 12 to 18 inches apart, it would be very difficult to get in there without putting his hands against one column or the other, wouldn't it?

A That depends greatly on the conditions.

Q Yes, I am taking the conditions such as I described. If they were only 12 or 18 inches apart, in other words, leave a space about as wide as I indicate here, and about that high (indicating) it would not require very much care for a man to keep out of that space, would it?

A No, sir.

Q So that if that is approximately the space that is not a very dangerous position for a man to be in, if he has four and a half feet to walk along on?

A No, sir.

Q That is all.

A. L. M'NEALLY, produced as a witness on behalf of the Petitioner, being first duly sworn, on oath testified as follows:

DIRECT EXAMINATION.

BY MR. BYERS:

Q Mr. McNeally, state your full name.

A Arthur L. McNeally.

Q Where do you reside?

A Seattle.

Q What is your business?

A Manager Pacific Tow Boat Company.

Q How long have you been manager?

A Since August, 1910.

Q Whom did you succeed as manager?

A W. R. Chesley.

Q What is the business of the Pacific Tow Boat Company?

A Towing.

Q Is it the owner of the tug Argo?

A It is.

Q Was it the owner of the tug Argo on November 22, 1910?

A It was.

Q And it is still the owner?

A It is.

Q Do you remember any occurrence that happened on about the 22nd day of November, 1910, with reference to an accident?

A Yes, sir.

Q Were you manager of the Pacific Tow Boat Company at that time?

A I was.

Q I would ask you whether or not the tug Argo carries passengers?

A It does not.

Q I would ask you whether or not on the voyage on which this accident happened the steamer or tug had earned anything from passengers?

A She had not.

Q Or from tow?

A She had not.

Q Was that tug fully manned and equipped in accordance with her certificate of inspection at that time?

A She was.

Q Who was the manager or master?

A R. W. Wahl.

Q At the time of that accident— Are you a stockholder in the Pacific Tow Boat Company?

A I am not.

Q At the time of the accident were any of her stockholders on the vessel, present on the boat?

A They were not.

Q Do you know whether or not they knew anything of the accident until after they heard of its occurrence?

A Knew nothing of it to my knowledge.

Q Do you know Iver Nordstrom?

A I have seen him a few times.

Q Do you know of your own knowledge what position he occupied at that time?

A Fireman.

Q Do you know how long he had been employed at the time of the accident?

A No, I don't know.

Q Do you know approximately how long?

A No.

Q State where this vessel was being navigated at the time of the accident?

A Between Seattle and Richmond Beach.

Q On what water?

A Puget Sound.

Q That is all.

CROSS EXAMINATION.

BY MR. HALL:

Q Mr. McNeally, what was your business before you became manager of the Pacific Tow Boat Company?

A Immediately?

Q Yes?

A Bookkeeper.

Q What was your business prior to that?

A I had been connected with tow boat business in different capacities for six or eight years.

Q In what position?

A Well, assistant manager, bookkeeper.

Q All of your duties were clerical before that?

A Absolutely.

Q You never had any experience in the running of tugs?

A Actual operations, you mean?

Q Yes.

A No.

Q You know nothing about the actual operations of tugs, then?

A I do not.

Q You have never had any experience as a sailor or otherwise?

A No, sir.

Q How many tugs did the Pacific Tow Boat Company have when you took charge as manager?

A Nine.

Q Will you give me their names?

A Argo, Yellow Jacket, Active, George T., Lumberman, Defender, Hero, Parthia and Ruth.

Q Now, which of these tugs, if any, are of the size of the Argo, in the same general class of tugs?

A Yellow Jacket.

Q Any of the others?

A Well, the Active is approximately the same size.

Q Is the equipment of the Active in so far as her boilers and engines are concerned the same as the Argo?

A I know nothing definite regarding the construction of the boats.

Q What were your duties as manager?

A General duties of any manager.

Q Well, I mean—be a little more explicit. As regard to the tugs, did you have anything to do with the tugs themselves, or was your work more specially connected with what they earned or such as that?

A It was.

Q It was more especially connected with the earnings and the office work rather than the operating?

A Yes, sir.

Q Did you hire the men?

A I had hired—

Q Did you at that time?

A What way do you mean?

Q I mean do you hire the captains, mates and firemen?

A I hire the captains and engineers and the officers.

Q What is it?

A I hire the officers, the other men on the boats are hired by the men on the boats.

Q Did the Captain hire the engineer?

A Sometimes we got men through the employment office.

Q Do you know how you came to get Iver Nordstrom?

A No, I don't remember.

Q Is there an officer of the company by the name of Studdert?

A He is our Port Engineer.

Q Spell the name.

A S-t-u-d-d-e-r-t.

Q Do you know— Did you make any examination of the different tugs when you became manager?

A No.

Q Have you made any examination since?

A No. That is, if you mean in particulars.

Q Yes.

A No.

Q Where had the Argo been on this trip?

A Going down to Richmond Beach.

Q And she was returning from there?

A She was on the trip between here and Richmond Beach.

Q What was she doing at Richmond Beach?

A She had gone down there to pull the tug McKinley off the beach.

Q Did she pull the McKinley off the beach?

A No.

Q Who was the owner of the McKinley?

A Jack Sutherland.

Q Did you make any charge for this trip down there?

A Not for that trip.

Q Because it was unsuccessful?

A His boat followed. I might say in connection with that trip it was the intention originally to bring a scow down, but owing to the weather conditions the scow was left and brought down later.

Q But there was no charge for this trip?

A No.

Q Did you say that the boat was fully manned and equipped?

A She was.

Q What do you mean by that?

A Full compliance with the regulations.

Q What are the regulations?

A It is supposed to have—

Q How many men?

A Seven men altogether. Four licensed officers, and seven men altogether.

Q Seven men altogether?

A Seven men altogether.

Q And equipped?

A She was fully equipped so far as I know.

Q As a matter of fact you do not know?

A Not positively.

Q When you said she was fully manned and equipped you really did not mean that you know of your own personal knowledge that she was fully equipped?

A I mean that instructions had been given to fully man and equip her.

Q Who had given the instructions.

A I had given the instructions to the captain.

Q As I understand it from your answers to the preceding question, not being familiar with tugs of this class and the full make up of them, you can not tell of your own knowledge whether it was fully equipped or not?

A Not without looking at the regulations.

Q Well, did you look at the regulations this time?

A No.

Q Do you know what the regulations are?

A No.

Q No?

A Not without looking at them.

Q Then you do not know whether she was fully equipped or not?

A Probably I don't.

Q Do you know the duties that Iver Nordstrom was supposed to perform on that boat?

A Not specially, no.

Q Did you ever go aboard the Argo prior to the accident to Iver?

A Yes, I had been aboard her.

Q Did you ever make an examination of her as to her equipment?

A No.

Q You did not know anything about the condition of this guard?

A No.

Q Whose duty was it to inspect the boats and see that they were fully manned and equipped?

A Why, the Port Engineer's.

Q Port Engineer, Mr. Studdert?

A Yes.

Q Is that his duty?

A He looks after it to see that the things are all in proper shape.

Q I take it, then, that work is left for him to see to all the tugs?

A So far as the engine room is concerned.

Q Would that include any guards around the crank pit?

A I should think so.

Q It is then as a matter of fact his duty to see that everything around the engine room is correct?

A I should think so, yes.

Q You know, don't you? If it isn't his duty, it is somebody else's duty, and you say it is his particular duty?

A To look after the engine room, yes.

Q That includes the guards?

A Yes.

Q Mr. McNeally, you are manager of this company, you run the whole thing?

A I understand that.

Q You know what his duties are?

A Yes.

Q Do you employ the Port Engineer?

A I do.

Q When you employed him, did you tell him what his duties were?

A To look after the engine rooms, that is his duty.

Q Did you tell him at that time if there was anything unsafe that he must make it safe?

A I did not tell him that.

Q Then whose duty was that?

A How?

Q Whose duty would that be, then?

A To see that those things were safe?

Q Yes.

A I really don't know.

Q You say that this tug was fully manned and

equipped and passed the inspection of the Government inspector?

A Yes, so far as my knowledge is concerned. She had passed inspection, I think.

Q Do you know when she passed inspection?

A No, I don't remember.

Q Do you know whether or not she had been inspected while you were manager prior to the accident to Iver?

A I do not know.

Q Were you ever on board when an inspection was made?

A No.

Q Will you state how an inspection is made?

A Why, we notify the inspectors to come down to inspect the boat, it is their duty to make the inspection.

Q Do they come to the office and tell you they are ready to make the inspection?

A No.

Q You don't know when the inspection is made?

A They tell us about when.

Q Is anybody detailed from your office to assist them?

A Mr. Studdert is generally there when they inspect the boats.

Q He is there to assist them in the inspection?

A What do you mean?

Q He is present on the boat when the inspection is made?

A He is.

Q What is he there for?

A Why, to see what they want done.

Q Well, I wish— Are you familiar with the tug Active?

A Only in a general way.

Q You don't know much about the details of the boat?

A No, I don't.

Q Do you know whether her crank is lower than the floor of the deck, as the Argo's is?

A No, I don't.

Q Do you know whether there is a guard around the crank pit on the Active?

A No, I don't.

Q Did you know at the time, or prior to the time that Iver was injured that there was a Guard around the crank pit of the Argo?

A No.

Q Do you know whether there is one there now, or not?

A No, I don't.

Q Do you know whether the cylinder, or the crank pit of the Argo is lower than the floor of the deck?

A No, I don't know.

Q Did I ask if you knew the duties of Iver Nordstrom on the boat?

A You did.

Q And you said you didn't?

A Only in a general way.

Q What do you mean by general way?

A Well, he was the fireman.

Q Did you assume this duty— When you took charge as manager of the Pacific Tow Boat Company, did you have the same duties that Mr. Chesley had who preceded you?

A Well, I presume generally the same, yes.

Q Who are the officers of the Pacific Tow Boat Company?

A F. M. Dugan is President, W. L. Beddow is Vice President, J. L. Bridge is Secretary and Treasurer.

Q Now, outside of the officers or next to the officers of the company you have complete charge?

A No.

Q Who has charge over you?

A The Board of Directors.

Q Did the Board of Directors when you took charge of the company tell you what your duties would be as manager?

A Not specifically, no.

Q Among your instructions received when you became manager, was it your duty to see that the boats were fully manned and equipped?

A No instructions given to that effect.

Q Well, whether or not they were given, was that your duty?

A The United States makes them keep them equipped.

Q But, you understand, Mr. McNeally, that a corporation have to act through its agents, therefore the corporation would have to have somebody

whose duty it was to see that they were fully manned and equipped, these tugs. Now, was that your duty?

A Why, in an executive way, yes.

Q Well, explain what you mean by that?

A Well, if I found anything that was unmanned it would be my duty to see that it was manned.

Q Well, how would you find—

A My instructions to the captain are to keep them fully manned and equipped to comply with the United States regulations.

Q Then, as I understand you, you give those instructions to your captains?

A Naturally.

Q Do you see that the instructions are carried out by the captains?

A Why, not particularly; they are liable to a fine or suspension if they do not keep their boats in proper shape.

Q How do you know when a boat is not fully manned or equipped? Do you wait until an accident happens?

A Every inspection of the Government tells us whether they are, or not.

Q How often are the inspections made?

A Once a year.

Q Supposing something would get wrong after the inspection?

A Unless it was reported to me I would not know.

Q You don't make it the duty of your captains to report?

A It is supposed to be their duty.

Q Do you make it their duty when they find anything wrong to report it to you?

A They have those instructions.

Q From you?

A Yes.

Q Did anybody make a report to you about this guard that was on the Argo around the Crank pit?

A They did not.

Q You said you didn't know when the prior inspection was made?

A I don't remember.

Q Do you know when the inspection after the accident was made?

A No, I don't know when her inspection comes due.

Q Then, how do you know when it is time to notify the inspectors?

A The captain or port engineer keeps run of those things as a rule. We are subject to fines if we run over time.

RE-DIRECT EXAMINATION.

BY MR. BYERS:

Q Mr. McNeally, you are general superintendent of the Pacific Tow Boat Company?

A Yes sir.

Q And is it customary—is it the province of the manager of the business to go down and inspect the

boats and see that the items in the boats are installed?

A It is not.

Q How often are the boats inspected by the Government?

A Once a year.

Q When the Government has made an inspection, what does it do?

A Why, they go over all the equipment thoroughly, so far as I know.

Q And if they find anything wrong, what do they tell you about it?

A Tell us about it.

Q Then what does the captain do with regard to the boat, after the inspectors have told them what to do?

A Report at the office.

Q Then what is done with it?

A Fill it.

Q Then what? Is it the duty of the captain and port engineer to keep their engine room or ship in good condition until the next annual inspection?

A They have instructions to do so.

Q They always do so as a matter of fact, don't they?

A Yes, sir.

Q They are subject to fine and have their papers taken away if they do not comply with these rules?

A I believe they are.

Q Do you know, as a matter of fact, whether

this boat had not been inspected each year since she had been in commission?

A She certainly must have been, she could not be running.

RE-CROSS EXAMINATION.

BY MR. HALL:

Q Do you know whether she had been inspected each year or not?

A I positively know.

Q You testified in your cross-examination, I believe, that you did not know how the inspection was made, didn't you?

A I did not testify, only did not know specifically how it was made.

Q You know an inspection was made, but you did not know how they made it? Wasn't that your answer?

A I don't believe so; I don't remember.

Q Now, did you ever have any experience with running of engines?

A No, sir.

Q Of any kind?

A No, sir.

Q You never had any? In your duties you had never worked around a boat, been employed on a boat around engines or the crank pits?

A No, sir.

Q Then you couldn't know from your own knowledge whether or not something was wrong?

A No, I would not.

Q Would you know from your own knowledge whether a certain place would need a guard or not?

A No. I might have an opinion.

Q Was this guard ever reported to you after the accident?

MR. BYERS: We object to that as immaterial and irrelevant as to what occurred after the accident does not have any bearing on this case.

A I never knew there was any guard there.

Q When did you first find out there was a guard there?

A I don't know today there is a guard there.

R. W. WAHL, produced as a witness on behalf of the Petitioner, being first duly sworn, on oath testified as follows:

DIRECT EXAMINATION.

BY MR. BYERS:

Q Your name is R. W. Wahl?

A Yes, sir.

Q Are you a licensed Master of steam vessels?

A Yes, sir.

Q How long have you been a licensed Master of Vessels?

A Since '98.

Q Were you in charge of the Argo on November, 1910, at the time the accident happened to Iver Nordstrom?

A Yes, sir.

Q How long had you been in charge of the vessel at that time?

A Since the 24th day of October.

Q I would ask you, Captain, to state whether or not it is the duty of a Captain to see that his vessel complies with the certificate of inspection of the inspectors with regard to equipment?

A Yes, sir.

Q That is outside of the engine room?

A Yes, sir.

Q Whose duty is it inside of the engine room?

A Chief Engineer's.

Q Outside of the engine room, I would ask you if the vessel was fully manned and equipped?

A Yes, sir.

Q What lights did she carry?

A She carried the lights that are compelled by law to be carried.

Q That is what we call a legal conclusion. I want you to state just what lights she carried?

A Mast head light and side lights; a range light—white range light.

Q How many officers and men did she have aboard?

A Four officers and three men.

Q Did that comply with the certificate of inspection?

A Yes, sir.

Q A vessel of this class is inspected how many times a year?

A Once a year.

Q When the inspectors come through, what are they inspectors of?

A Hulls and Boilers.

Q Two separate men?

A Yes, sir.

Q And have their separate provinces?

A Yes, sir.

Q Those vessels are inspected every year, as you say, by these inspectors?

A Yes, sir.

Q Then what is the Captain's duty with regard to it?

A To see that everything is as they order on the vessel.

Q Does the Government take any measures to see that those recommendations and suggestions are complied with?

A Yes, sir; they don't furnish the certificate until everything is in shape.

Q Now, is there any other method that the Government takes to see that these rules are complied with? Are you visited any other time?

A We are boarded sometimes at times—

Q You are liable to be boarded at any time? And if the vessel isn't in shape and in compliance with these regulations—

A The captain is fined or his license suspended for a certain time, usually from fifteen to thirty days.

Q Were any of the owners of the Pacific Tow Boat Company present at the time of this accident?

A No.

Q Were any of them on board of the boat, or had been during that day?

A Not that I know of.

Q Captain, can you give the dimensions of that boat?

A I can give her tonnage.

Q What was her tonnage?

A Forty-four net ton; Sixty-five gross ton.

Q What is her length?

A I believe that she is 64 keel and 20 foot beam, and 9 feet 6 depth of hull.

Q Were you engaged in navigating on the waters of Puget Sound on that night in question?

A Yes, sir.

Q Was the Argo seaworthy in every particular at that time?

A Yes, sir.

Q She was a vessel of what age, as near as you know?

A Four years.

Q About four years, and she was sound, was she?

A As near as I know.

Q You are still running on her?

A Yes, sir.

Q She is sound now?

A As near as I know, she is.

CROSS-EXAMINATION.

BY MR. HALL:

Q You went to work October 24, 1910?

A Yes, sir.

Q That was just little less than a month before Iver was injured?

A Yes, sir.

Q Where had you been?

A Moved off the George T.

Q How long had you been working for the company at that time?

A Since 1905.

Q You said that there were four officers and three sea men?

A Yes, sir.

Q Who were the officers?

A Myself—

Q As Captain?

A C. O. Jensen, Chief Engineer; Brown Field, First Assistant; M. Brant, Mate.

Q And the three men?

A Iver Nordstrom, deck hand's name I don't remember. I don't remember the cook's name; we changed deck hands and cooks.

Q Was there a cook and deck hand on board?

A Yes, sir.

Q The law requires that number of men and officers on board a boat like the Argo?

A Yes, sir.

Q You say you had charge of the boat except the engine room?

A Yes, sir.

Q Would you have any charge of the engine room at all?

A No, not more than to give orders to the Chief.

Q Now, supposing there was something broken or defective in the engine room, whose duty was it?

A Chief Engineer's.

Q Then you had nothing to do with the passages around the crank pits in that part of the boat at all.

A No, sir.

Q You said that you thought this vessel was seaworthy?

A Yes, sir.

Q What do you mean by seaworthy?

A That she is in shape to go in any waters she is licensed to run on.

Q Do you mean that she is fully equipped in every particular?

A Yes, sir.

Q Would you know— Now, suppose there was a defect in the engine room, would that render the vessel unseaworthy?

A I don't know.

Q Well, for instance, if there was in the deck of the engine room there, in the passageway, supposing there were two or three planks out there, would the vessel be seaworthy then?

A I don't know.

Q What is your opinion, do you think it would be seaworthy then?

A I don't really know whether I do or not.

Q You know where Iver was injured?

A Yes, sir.

Q You know the passageway that is around the crank pit for the men to walk around?

A Yes.

Q Now, supposing there were two or three planks broken in that passageway, would the boat still be seaworthy?

A Yes, I think so.

Q Now, isn't it a fact that you mean by seaworthy the fact that she has what lights are required by law, and that her hull is in good condition, is that what you mean?

A Yes, sir.

Q You don't mean by seaworthy that all the internal equipment is all right, do you? Do you mean by seaworthy that all the equipment in the engine room is all right?

BY MR. BYERS: We object to that, the witness has already testified in answer to the question of counsel.

A Well, I think she is.

Q You think, then, that if there are three or four boards gone down there in the passageway she is still seaworthy?

A Yes, sir.

Q What papers do you hold?

A Master's.

Q When did you get them? ..

A 1908.

Q 1908 or 1898?

A 1908; I had pilot's papers before that.

Q You have just been a Master, then, since 1908; what part of the year?

A October, 1908.

Q Then you had been a Master for two years?

A Yes, sir. I had Pilot's papers since '98 and I could go as Master on those papers up till that time; the law was changed; it was Master's papers instead of Pilot's papers.

Q Are you required in your examination for Master to be familiar with the laws passed by congress relative to inspection of vessels?

A Yes.

Q You are supposed to read them and to know them?

A Yes, sir.

Q Going back to the former line of questioning, if there were two or three boards broken or gone in that passageway, whose duty was it to report those things and get them repaired?

A The engineer's.

Q Chief Engineer?

A Yes, sir.

Q You had nothing to do with that part of the boat, then?

A No, sir.

Q You would have nothing to do with the guard on that boat if there was one there?

A No, sir.

Q That didn't come under your supervision at all?

A No, sir.

Q You say that the boat is inspected annually?

A Yes, sir.

Q By two inspectors?

A Yes, sir.

Q One, inspector of hulls, the other inspector of boilers.

A Yes, sir.

Q Under whose supervision would the inspection of the hull take place, under yours as Captain?

A I don't understand that.

Q I mean when the inspectors came aboard to inspect the boat, one would be the inspector of hulls and the other inspector of boilers?

A Yes.

Q Now, would you have anything to do with showing them over the boat?

A Yes, sir.

Q You would. Now, if there was anything wrong with the equipment of the vessel outside of the boilers, then it would be your duty under the law to tell the inspectors of such defects?

BY MR. BYERS:

Object to the question and move to strike it on the ground that it is a question of law to be decided by the court and on which this witness is not examined and therefore improper cross-examination on which he is incapable to testify, as to the manner in which the inspectors inspect vessels and the way they inspect them is laid down in the rules, and the supervising of inspections is a matter provided by law.

Q You say that you stated, did you not, that it was your duty to see that the vessel and equipments complied with the certificate of inspection?

A Yes, sir.

Q You testified to that?

A Yes, sir.

Q And as long as it complied with the certificate of inspection that is all you were required to do?

A As regard to that inspection, yes, sir.

Q Now, what does the certificate of inspection require as to the equipment being in good condition?

A Why, it requires for all equipment to be in good condition.

Q What do you mean by equipment, Mr. Wahl?

A Life saving apparatus, lights, steering gear, anchors, fire hose, fire buckets, life boats, anchor cables—

Q Does it have any reference to the machinery or to the other parts of the boat being safe for the men to work around?

A I don't know.

Q Supposing there was some place that the inspectors could not see or did not see that was defective, was that your duty to point it out to them?

BY MR. BYERS: Object to this question because it is absolutely contrary to the law because it assumes a proposition contrary to the facts, because there are no places that the inspectors are not presumed under the law to see.

A If I knew it.

Q You stated it was your duty to see that it was all right, was it not?

A Yes, sir.

Q Then, it is for you to know whether there are any defects in there or not, is that true?

A If I know of any it is up to me to report them.

Q How do you find them out?

BY MR. BYERS: Objected to on the ground that it is improper cross-examination for the reason that witness is being examined on matters of law provided by statutes and rules promulgated in them provided for inspection of steam vessels and that they are not matters of fact at all.

A I didn't quite understand that.

Q Well, if there are any defects in the equipment, Mr. Wahl, how do you get knowledge of the defects?

A I look over them and see if they are all right.

Q You are around the boat and look it over to see if they are all right?

A Yes, sir.

Q You testified a few minutes ago that it was your duty to keep the vessel up to the requirements of the certificate of inspection, is that so?

A Yes, sir.

Q Now, the certificate of inspection shows, does it not, that the inspectors have examined the hull and the equipment and that they are all right in every particular, is that true?

A Yes, sir.

Q Now, it is your duty, then, to—in keeping it

up so as to be covered by this certificate of inspection, to see that everything is in good shape on board the boat?

A Yes, sir.

Q Supposing, Mr. Wahl, there was an opening in the deck there for some purpose, would it be your duty to see that there was a cover provided for the hole or that there was a rail around the hole—would that be your duty?

A It would be on deck.

Q Would it be in the lower deck where the engines are?

A No.

Q Whose duty would that be?

A The Chief Engineer's.

Q You went on this boat October 24, 1910?

A Yes, sir.

Q Did you inspect the boat and go over it then to see if everything was all right?

A I looked after the steering gear and lights on board the deck.

Q Did you go over the decks and equipments to see that they were all right?

A Yes, sir.

Q Did you go into the engine room to see if that was all right?

A No, sir.

Q That wasn't any of your duty at all?

A No, sir.

Q Was this boat on the day Iver Nordstrom was injured complying with the certificate of inspection?

A As near as I know.

Q As near as you know, what do you mean by that, Mr. Wahl?

A Well—

Q You testified that it was your duty to see that the equipment was safe?

A Yes, sir.

Q Had you made an inspection to see it was safe?

A I didn't make an inspection, but I knew there should not be anything missing from the equipment but what I would know it.

Q Had you been down in this floor where Iver was injured before the date of his injury?

A I don't remember.

Q Did you know about the guard being around that crank pit?

A Not that I know of.

Q Didn't you ever see a guard there?

A No sir, I don't know.

Q What is it?

A No, sir.

Q You never did see a guard there. Did you ever see a ship that hadn't?

BY MR. BYERS: We object to this because it is direct examination and we object to this unless counsel makes this witness his own.

Q Was it your duty as captain of that vessel to see that there was a guard around there?

A I don't think so.

Q Whose duty was it, then?

A Engineer's.

Q You said you don't think so, do you know whether or not it was your duty? Do you know whether or not it was your duty to see whether a guard was there, and if there was one there to see if it was in good condition?

A I don't know.

Q Mr. Wahl, if you didn't know whether a thing was a part of your duty or not, how would you find out whose duty it was?

BY MR. BYERS: Object to the question as calling for not only a conclusion of fact, but it is calling for a conclusion of law and is improper, irrelevant and inadmissible.

Q If you did not know whether or not a certain thing was your duty, how would you find out, from whom would you find out whether it was your duty or not?

A I don't quite understand.

Q Now, it wasn't your duty to run the engine, was it?

A No, sir.

Q It wasn't your duty to see that the equipment of the engine room was all right, was it?

A The boiler inspector generally notified the engineer if there was anything wrong.

Q Was that your duty to see if the equipment of the engine room was all right?

A Not that I know of.

Q How did you learn, or where did you learn

your duties as Captain, Mr. Wahl, would that be from experience?

A Yes, sir.

Q And then you took an examination?

A Yes, sir.

Q To show what your duties were?

A Yes, sir.

Q And if you passed that examination you got your Master's license?

A Yes, sir.

Q Now, when you got your Master's license, then you knew what your duties were on board a steam vessel, didn't you?

A Yes, sir.

Q Then you must have known, must you not, what your duties were on board the Argo?

A Yes, sir.

Q You say here you did not know whether a certain thing was one of your duties or not, don't you?

A About the engine room?

Q Yes, you said you didn't know whether the duty of putting up a guard there, if one was needed, was your duty or not?

A As near as I know it was not my duty.

Q It is the chief engineer's duty?

A Yes, sir.

Q What does the certificate of inspection state, Mr. Wahl?

BY MR. BYERS: We object to that because the certificate itself is the best evidence of what it states.

A States that the proper lights and proper life saving apparatus and anchors, fog signals and distress signals in case the steam goes off, the boiler and steering gear and water barrel and water buckets, fire hose, life preservers.

Q Does it mention all of these things?

A Yes, sir.

Q Does it mention anything about the machinery and the other equipment?

A About the boiler.

Q Does it say anything about the machinery?

A Not about the machinery except the size of it.

Q Does it say that the machinery and other equipment should be in good condition?

A No, sir.

Q Who inspects the boat as to machinery?

A The assistant inspector.

Q Assistant United States Inspector?

A Yes, sir.

Q When was this boat inspected after the accident?

A First day of December.

Q What year?

A 1910.

Q Was the boat in the same condition then as it was prior to the accident?

A As near as I know.

Q Was the guard that was on there around the crank pit in the same condition as it was at the time Iver was injured?

A I don't know.

Q Is the guard today in the same condition as it was when he was injured?

A I think it is.

Q When did you see it last?

A I could not say.

Q Have you seen it since then?

A Well I don't know whether I have been down stairs since or not.

Q Do you know as a matter of fact, that the guard has been changed to the outside of the columns?

BY MR. BYERS: We object to that as not being proper examination about which this witness is being cross-examined, and for the reason that it is immaterial what has been done with this boat since this accident.

A I don't know; I don't remember.

Q You don't remember?

A No, sir.

Q Then, you do not know whether it has been changed since the accident or not?

A Not that I remember.

H. S. STUDDERT, produced as a witness on behalf of the Petitioner, being first duly sworn, on oath testified as follows:

DIRECT EXAMINATION.

BY MR. BYERS:

Q Your name is H. S. Studdert?

A Yes, sir.

Q And you are the Port Engineer for the Pacific Tow Boat Company?

A Yes, sir.

Q As Port Engineer you—what are your duties?

A To look after the engine rooms in the various boats.

Q You looked after the engine room of the Argo?

A Yes, sir.

Q I would ask you whether or not at the time of the accident, you were such Port Engineer, November, 1910?

A Yes, sir, about three years I have been there.

Q I would ask you to state whether or not the engine room at the time of the accident was identical, calling special attention with regard to the splash pans, with the time when they were previously passed and inspected by the inspector of boilers?

A Yes, sir, they were just the same.

Q I would ask you if you know how long prior to that time they had been the same?

A They were the same ever since I went to the company.

Q And that had been some time before that?

A Yes, sir.

Q I would ask you whether or not that engine room was completely equipped substantially as all other vessels of the type of the Argo?

A Yes, sir, just the same, just as substantially.

Q What kind of engine?

A fore and aft compound.

Q What is its size?

A 9—22—20.

Q It has three columns on its open face?

A Yes, sir.

Q And the engine faces toward the starboard side of the boat?

A Yes, sir.

Q Could you tell us the size of the boat?

A The boat, I think, is 64 feet long, 20 foot beam, and I am not positive, but I think 9 foot hold.

Q Are you a licensed engineer?

A Yes, sir.

Q When was your first license?

A About eighteen year ago.

Q Have you been—where have you been employed?

A On various boats and places.

Q How long by the Seattle Tug Company?

A Eight or nine years.

Q And since, where have you been employed?

A Port Engineer for these people down here.

Q Seattle Tug Company operated here in Seattle, did it?

A Yes sir, I was Port Engineer for them too for a while.

Q Seattle Tug Company and Pacific Tow Boat Company operate substantially the same class of vessels, tug boats on Puget Sound?

A Yes sir.

Q I would ask you to state whether or not the

engine room equipment complied substantially with the certificate of inspection issued to that vessel?

A Yes sir.

Q The vessel had been inspected as a matter of fact how many times before this accident by the United States inspectors.

A They are inspected every year.

Q It must have been inspected about four times then?

A Yes sir, about four times.

Q You hired Iver Nordstrom, did you?

A Yes sir.

Q Was it your duty to hire engineers and firemen?

A I hired engineers.

Q Did you hire Iver Nordstrom?

A Yes sir.

Q What, if anything, did he report about himself at the time you hired him?

A He claimed to be a fireman.

Q And you hired him as fireman??

A Yes sir.

Q How long before this accident in question did you hire him?

A I can't recall, about a month or six weeks, in that neighborhood.

Q Had he ben employed until the time of the accident?

A Yes sir.

Q On this identical vessel?

A Yes sir.

Q Where did his duties as fireman take him?

A In the fire room, in the engine room.

Q Could you state in a general way and very briefly what are the duties of a fireman?

A He keeps steam, does the oiling, cleaning up, cleaning bilges, any labor that is to be done around the engine room. Coaling.

Q Were you present the night of the accident?

A No sir.

Q When did you first learn of it?

A Next morning.

Q Did any of the owners of the boat, so far as you know, know of the accident before it occurred, or know of the cause of the accident before it occurred.

A No sir.

CROSS EXAMINATION

BY MR. HALL:

Q Mr. Studdert, you said it was your duty to look after the engine rooms of all the tugs belonging to the Pacific Tow Boat Company?

A Yes sir.

Q It was your duty at the time Iver was injured?

A Yes sir.

Q It had been your duty for all the time you had worked there?

A Yes, according to the United States inspectors, what they wanted done.

Q Was it a part of your duty to look after the passage way around the crank pit?

A Every part of the engine room.

Q Deck floor?

A No, no.

Q The floor?

A Yes, the floor of the engine room?

Q If there were three or four planks loose in the passage way around the crank pits—

A It would be my duty to have it fixed.

Q Who assigned that duty to you?

A Pacific Tow Boat Company.

Q When you went in their employment as Port Engineer three years ago?

A Yes sir.

Q Did they tell you to look after the guards?

A I was supposed to look after the engine rooms entirely.

Q When you went aboard did you make an inspection of everything?

A Yes sir.

Q Did you inspect this guard around the crank pit?

A Yes sir. It is really not a guard it is put up for a splash pan.

Q How do you know?

A That is my candid opinion.

Q What if the manager of the boat company testified that he recognized that there should be a guard there and that he put it up as a guard, would you change your opinion?

A No sir.

Q You would still say it is a splash pan?

A Yes sir.

Q Don't you recognize there should be a guard there?

A Not necessarily.

Q What is to prevent a man from falling in?

A There is not very much danger of falling in that part of the engine.

Q The crank pit is below the floor is it not?

A The crank pit is always below the floor.

Q Are you sure of that?

A You may get one in a great many that isn't.

Q Didn't you ever see a boat where the cranks were on a platform above the floor?

A I can not place any boat of her size or class.

Q Aren't there any on the Sound?

A Very few. You say the bottom of the crank pit? Not that I know of.

Q Would it still be called the crank pit?

A Yes sir, it would not matter what position it is in.

Q Did you make an inspection, at the time you assumed your duties as Port Engineer, of this crank pit?

A Yes sir, on all the boats, I did.

Q You made an inspection of this guard?

A Yes sir, I noticed the splash pan or guard.

Q You call it splash pan and I call it guard, it is the same thing.

A Just a piece of light sheet iron.

Q What thickness was it?

A It is not a sixteenth of an inch, it is very light.

Q Now, did you know at the time that you assumed your duties that it was unfastened at the bottom?

A I knew it was simply laid in there.

Q Did you know it was unfastened at the bottom to the columns.

A No, I did not. I don't think that I did.

Q Wouldn't a careful inspection have shown you it was unfastened?

A I don't know that I would have fastened it if I had.

Q Now, state whether or not you knew whether this was unfastened at the bottom?

A I did not know it.

Q Did you know it up the time Iver was injured?

A No, I did not.

Q Then you could not have inspected it closely, could you?

A Yes sir, I inspected it closely.

Q Did you look at the bottom of this guard?

A I looked at it afterwards.

Q Do you mean to say that it is not necessary to have a guard around a crank pit?

A If it was necessary the United States Inspector would have ordered it there, it is up to them to order it there, it is up to me to keep it there.

Q Do you say it is not necessary?

A No, not necessary.

Q When the inspectors were inspecting the engine room, did you go around the boat with them?

A Yes sir.

Q Did you show them this guard?

A No sir.

Q You did not call their attention to that?

A No sir, I didn't think it needed it.

Q If you had known it was loose at the bottom would you have called their attention to the fact?

A No sir.

Q It would not have any effect on what you told the inspectors?

A I don't think the inspectors would make me fasten it.

Q Do you think they would put a guard there at all?

A No sir.

Q Have you any guards on the other boats?

A Splash pans.

Q What have you on the Active?

A A piece of iron fastened on the columns, standing possibly 8 or 10 inches high, to keep the splash from coming over.

Q Is that all its duty?

A Yes sir, that is what it is put there for.

Q Just to keep the oil from coming out?

A Yes sir.

Q Where is it placed on the inside or the outside of the columns, on the Active?

A On the outside.

Q If anybody should have discovered that this was loose at the bottom it was your duty to do so, was it not?

A Mine or the Chief Engineer's; the Chief Engineer was to report to me if he found anything wrong.

Q Were you present at every time it was inspected?

A Ever since we got possession of the boat, yes.

Q You say that during all the time you were there it was in the same condition at every inspection as it was when Iver was injured?

A Yes sir.

Q Is it the same way now?

BY MR. BYERS: We object to that as immaterial, irrelevant and incompetent.

Q What is the difference now?

A It is on the outside now.

Q On the outside and fastened at the bottom too?

A Yes, there is a piece of board fastened onto it.

Q Have you any interest in the company?

A Yes sir.

Q You are a stockholder in the company?

A Yes sir.

Q How much of an interest have you?

BY MR. BYERS: Objected to as immaterial, irrelevant, improper questioning.

A About \$7,000.00.

Q Out of a capital stock of how much?

A About \$120,000.00.

Q Did you invest this money when you got your position as Port Engineer?

A No sir, had it before.

Q Do you hold any position in the company, are you an officer of the corporation?

A Yes, I am, I have a vote.

Q You have a vote. Are you an officer?

A No sir.

Q Are you director or trustee?

A Yes, director of the company.

Q How long have you been director?

A Just six or eight months, just a short time.

Q But you were a stockholder at the time Iver was injured?

A Yes.

Q You never have been president, vice-president, secretary or treasurer of this company, have you?

A No sir.

Q What other boat on the Sound here that has its crank pit lower than the floor of the deck that is without guards?

A That are without guards?

Q Yes, limit that to your company.

A On all our boats the bottom of the crank pits are below the deck.

Q How many are without guards?

A They all have splash pans.

Q What are those splash pans constructed of?

A Some of inch board, some possibly of just common light iron such as the Argo, I think the Active

has the heaviest one, she is about one-sixteenth, in that neighborhood.

Q As Port Engineer, did you cause any of these guards or splash pans, as you call them, to be put on around the crank pits?

A No, they were all in the same condition when I went there.

Q In the same condition as they were when you went there?

A With exception of the Argo.

Q Is it as effective to prevent the splashing of oil to have this sheet iron on the outside of the columns as it is to have it on the inside?

A Well, in the Argo's case it was better to have it on the inside.

Q You have got it on the outside now, does the oil come out now?

A Yes, sometimes the oil slips out.

Q Have you any other business besides being Port Engineer of the company?

A Eagle employment office.

Q Did you have it at the time that Iver was hired?

A Yes sir.

Q Part of your duties as Port Engineer of this company, I believe, was to hire the firemen, is that true?

A Not necessarily, I hire firemen, anybody hires the firemen, they sometimes hire the firemen on the boats, but I hire the engineers and a part of the other help.

Q You say that when Iver applied to you for employment he said that he was a fireman?

A Yes sir.

Q Did he tell you what his experience was?

A He said he had worked in saw mills, and I think that at the time there was somebody with him that said he had fired in the Old Country.

Q Did he say he had ever been on a boat before?

A I think he did, but I am not positive.

Q When you hire a man like that for the company is he examined as to his qualifications?

A I ask him just what he can do.

Q So that you are satisfied that he can do the work assigned to him?

A Yes sir.

Q Do you give him the instructions?

A Yes sir.

Q What did you tell Iver to do?

A He went to work as fireman.

Q Did you make the arrangements with him as to the amount of salary he was to get a month?

A Yes sir.

Q And other details that were necessary as to his duties?

A Yes, fire and oil and what he had to do.

Q At that time you say you were running an employment office?

A Yes sir.

Q The Eagle Employment Office?

A Yes sir.

Q Here in the city of Seattle?

A Yes sir.

Q Were you at that employment office when Iver applied for work?

A I was there; I hired him.

Q Did you tell him at that time that you had an interest in the company?

A No, I didn't, I am sure I didn't.

Q How much of your time do you spend at this employment office?

A Not very much, I am out a great deal.

Q You charged him a fee for getting him this position?

A Yes sir.

Q If there were anything wrong about the engine room or in the equipment or around there, it was your duty to remedy the defect, was it not?

A Yes sir, that is, I wasn't above the United States inspectors.

Q They would only inspect once a year, wouldn't they?

A Yes sir.

Q There were things happen during the year?

A Yes sir, but the Revenue Cutters would come aboard.

Q How many times a year?

A That was up to them.

Q Do you remember of any time?

A No, they wouldn't tell me anything about it.

Q But when the boat would come in on every trip you would go over it?

A Mostly every trip.

Q And if there was something wrong there you would remedy or repair it?

A Yes sir.

Q If there had been a guard required here it would have been your duty to have put it in, would it not, or to see that it was put in, if one had been required by the inspectors?

A Yes, certainly.

RE-DIRECT EXAMINATION.

BY MR. BYERS:

Q Did there any change occur in this so-called splash pan or guard subsequent to the inspection of the United States Inspectors and prior to the accident to Nordstrom?

A Give me that question again please.

Q Did there any change occur in this particular, so-called splash pan or guard after the inspectors had inspected it, and before Nordstrom got hurt?

A No change, whatever.

Q When Iver was hurt it was in identically the same condition as it was when the inspectors had inspected it?

A Yes sir.

Q And had been in that condition ever since the vessel had been built?

A Yes sir.

Q Was there anything to prevent Iver from going back and getting tangled up with the main shaft?

A No, he could go in there too, the shafts in a majority of engines are open.

Q As a matter of fact, was it or was it not perfectly open and apparent that if he did stick his feet into the crank pit he would get hurt?

A Certainly.

Q These openings that he could possibly stick his feet through are about how big?

A I never measured them, I think about eighteen or twenty inches probably.

Q And at the foot of these columns and outside was a two by four?

A There was a small board. I don't know what size it was. There was a stick there.

Q About the size of a two by four?

A I could not say.

Q And at the top of these were the cylinders and their casings so that in case of a lurch of the vessel or anything of that sort he could put his hands against these projecting things and keep from going in?

A Yes sir.

Q Did you ever see a tug of this size that did not have the crank pits below the floor?

A No, that is, the bottom of the crank pit.

Q Did you ever see any fore and aft compound engines, other than tugs—

A No, not that class of boat.

Q I want you to explain a little more. What are these splash pans for?

A The cranks going around dip the water that

comes from the drain on the engine and there is always grease mixed in it, and that throws it around the engine room.

Q There is always a little leak?

A Yes sir.

Q What is that crank pit for?

A It's a space made for the cranks to go around in.

Q What is the pit for?

A Just a space so as the shaft will revolve.

Q And there is where all the oil and drippings go into?

A Yes sir.

Q And the crank shaft with its counter balance—

A Picks it up.

Q And the straps are revolving around in the crank pit?

A Yes sir.

Q So that when the oil collects—

A It picks it up and throws it over the boiler and over the engine room.

RE-CROSS EXAMINATION.

BY MR. HALL:

Q When was the inspection made after this accident, December 1st?

A About December, I can't tell the date.

Q Were you present?

A Yes sir.

Q With the inspectors when they made the inspection?

A Yes sir.

Q You say they made that inspection when the guard was in the same condition it was when Iver was injured?

A You speak of the inspection after the accident?

Q Yes.

A No, it was outside then, I changed it.

Q You are positive of that?

A Absolutely.

Q The bottom was loose the same as it was—

A Every inspection until after he was injured.

Q How do you know it was loose?

A It wasn't exactly loose, it was held sufficiently to stay there.

Q There was no bolt?

A It was inside the heads of some bolts.

Q And not fastened with any bolts?

A It was simply inside the bolts.

Q It was put in there as a splash pan, it wasn't put there with the idea of being a guard and therefore wasn't made substantially, it was not made for the purpose of being a guard?

A It was a splash pan.

Q That being the case, it did not make any difference whether the bottom was loose or not?

A Yes.

Q How was the top fastened?

A By U bolts.

Q You could see that the bottom was unfastened?

A The bottom went inside some bolts to hold it.

Q They were not strong enough so that if a person was thrown with his feet against the bottom of it to withstand the pressure?

A It was never put in there for a guard.

Q It wasn't strong enough for that purpose?

A Yes.

Q And you knew it?

A Yes.

Q And the inspectors could have seen it?

A Yes, they could have seen it as well as I could, it was put in there for a splash pan.

Q Did you or did you not, prior to the accident, know that the bottom of the guard or splash pan was not fastened?

A No, I did not.

Q You could see that there were no bolts fastening on the columns?

A No, I did not know it.

Q Then how did you know it was in the same condition every time they inspected it as when Iver was injured?

A The plate had not been moved, it must have been.

Q But you don't know of your own personal knowledge?

A Yes, I do, I could see it was in exactly the same position by the marks on the plates and everything where they pressed up against it.

Q You say that the oil would collect in the bot-

tom of this crank pit and be thrown over the engine room, and the purpose of the guard was to keep it from being thrown that way?

A Yes sir.

Q Wasn't there a hole in the bottom of the crank pit?

A Yes, there is generally a hole.

Q For the purpose of running the oil off?

A Sometimes it doesn't run off, sometimes it gets stopped up and the oil collects.

Q Did you ever know of oil collecting in the bottom of the Argo?

A Yes, it does all the time.

Q You say you don't know of a tug on the Sound that has its crank pit higher than the floor of the deck?

A I would have considerable trouble finding one.

Q Are you familiar with the tug Resolute?

A I don't think I was ever on it.

Q The Mystic?

A Yes. I think the crank pits on the Mystic are lower than the floor.

Q What other tugs?

A The Active's is below the floor.

Q The Active's is below the floor, but you have a good, strong guard there, haven't you?

A Yes sir.

Q What boat on the Sound—

A I couldn't tell you.

Q What boat on the Sound of the type of the Argo that has its crank pit—

A The bottom of the crank pit?

Q Yes, the bottom of the crank pit below the floor, is there that has not a guard around it, some sort of guard around it?

A They all have pans the same as the Argo had, if you call that a guard. I call a rail a guard.

Q You said some of the boats used canvas?

A I have seen one boat, and I have seen a piece of tin just hung there.

Q Do you know of any such boat now?

A Yes, there is one on Lake Washington.

Q A tug?

A Yes, and passenger boat.

Q What boat is that?

A I think it is the Fortuna, just a piece of tin hung up, the wind blowing it backwards and forwards, just a thin light piece of tin suspended in the air.

Q You are sure of that about the Fortuna?

A I am certain of it.

Q When did you see this boat?

A Very lately.

Q You went on purpose to see if you could find a guard like that?

A Yes.

Q Did you go over the Sound to find out whether there was any tug there?

A I went on some boats, yes sir.

Q And then you finally went to Lake Washington, and you found one there?

A Yes, there are several boats there in the same condition.

Q You didn't find any, did you, except the Fortuna?

A Yes, there are other boats. I am speaking that the Fortuna had a piece of tin just suspended there.

Q How long have you been trying to find boats that did not have guards?

A A very short time.

Q How long?

A I don't suppose I put in three hours, altogether.

Q It would take nearly that long to go to Lake Washington and back.

A No.

Q How long on the Sound?

A I can not say, a very short time, but I can name boats on the Sound that haven't anything at all. The Prosper has not even a splash pan, no hand rails, or anything.

Q Who owns the Prosper?

A She is owned by the Puget Sound Tow Boat Company.

Q Is the bottom of the crank pit on the Prosper lower than the floor of the deck?

A Yes, I think so.

Q Is the top of the crank pit, is that lower than the floor?

A The crank pit has no top, it is just an open space that the shaft revolves in.

Q In some places they are set up on a platform, are they not?

A A crank pit, Mister, is just a hole for the shaft to revolve in, it has no top, there it a bottom, but no top.

Q What other tug that has no guard at all?

A Seattle Spirit.

Q Is that a tug boat?

A Freight boat.

Q That has no splash pan or anything?

A I don't think so.

Q Is that the same type as the Argo?

A No.

Q No other?

A I can not remember, but I have seen several of them.

Q Now, without a guard of some kind there, if the crank pit is lower than the floor, what is there to prevent a seaman from being thrown into the crank pit?

A There are columns there to catch on to.

Q How wide? How far apart are the columns?

A About eighteen or twenty-one inches in the Argo.

Q You think that is a sufficient guard?

A Yes sir.

Q That is your idea of a guard, that is really not a sufficient guard?

A I think if it were not the inspectors would put guards there.

RE-DIRECT EXAMINATION.

BY MR. BYERS:

Q What about the boats of the Everett Tow Boat Company, say whether or not they are constructed the same as the Argo engine room was.

A The American Tow Boat Company?

Q Yes sir.

A Yes, their engines are practically on the same order.

Q And what about Buley's boats over in Tacoma?

A Same type, nearly, of course, there is always some change more or less.

Q Just the changes rendered necessary and convenient by the difference in the size of the boat?

A Exactly.

Q In all your experience have you ever known of a guard being put up to prevent a fireman from getting his feet into a crank shaft, a guard constructed for that purpose?

A No. There may be a guard there, but for that specially, no.

BY MR. HALL: Q What is a guard there for if there is a guard there?

A I don't know why.

BY MR. BYERS: Q On some boats where there is a very large space like in some of the larger boats, it might be necessary?

A Yes, then they have guards or hand rails.

Q Did you ever hear, Mr. Studdert of a man sticking his foot into the crank pit?

A No.

BY MR. HALL: We move to strike the question and answer as being incompetent and immaterial as to what he has heard.

BY MR. BYERS:

Q In your eighteen years experience as engineer has any such accident, or similar accident to this happened, such as to call the attention of an engineer to the fact that such could happen on a boat of this character and type?

A No sir.

BY MR. HALL:

Q Did you ever know of a man getting into a crank and being injured before?

A Not that I can remember.

Q During your eighteen years of experience you never heard of a man getting into the crank pit and being injured?

A No sir.

Q You lead us to believe that you are familiar with the tug boats of the American Tow Boat Company?

A I said they were similar.

Q Well, are you familiar with them?

A No.

Q Have you been on them?

A Yes sir.

Q Have you inspected their crank pits and engine rooms?

A No sir, not any more than I have been on them, not to give them an inspection.

Q Have they any guards, or splash pans on them?

(No answer. Argument by Counsel)

BY MR. HALL:

Q You know they are the same size, or practically the same size?

A They are on the same order.

Q Is that all you know about them?

A That is all.

Q You don't know anything about their crank pits or guards or any thing else?

A No, not that I could swear to.

HOWARD B. LOVEJOY, produced as a witness on behalf of the Petitioner, being first duly sworn, on oath testified as follows:

DIRECT EXAMINATION.

BY MR. BYERS:

Q State your name, Captain.

A Howard B. Lovejoy.

Q How long have you resided in this State?

A First came here when I was a year old.

Q Where have you resided?

A In Seattle for about ten years.

Q How long have you been in the steamboat business?

A I started when I was sixteen years old.

Q Have you been engaged in the building and operation of boats since that time?

A Practically, yes sir.

Q What boats have you built?

A Personally, I built about a half a dozen.

Q What are they? Their names?

BY MR. FULTON: We will admit his qualifications as an expert.

Q Are you familiar with a vessel here known as the tug Argo?

A Seen her, yes sir.

Q Are you familiar with her engine?

A Familiar with the ordinary fore and aft compound engine.

Q You are a licensed master of steam vessels?

A Yes sir.

Q And have installed engines of this character?

A Yes sir.

Q I would ask you if the engine in the Argo is installed in substantially the same manner as in all other vessels of the type of the Argo?

A I think so, yes.

Q I call your attention, Captain, to that part or fixture on this engine known as a splash guard. I would ask if you are familiar with that appliance or appurtenance?

A Yes sir.

Q What is its purpose, if you know?

A It keeps the oil from splashing out on the floor.

Q What causes that oil to splash out?

A Revolving of the engines and drippings from the steam.

Q I will ask you to state whether or not that

pan or guard is intended by engine builders and steamboat men to keep firemen or engineers to keep their feet from slipping into the crank pit?

BY MR. HALL: We object to the question as incompetent, irrelevant and immaterial and as leading.

A Why, I never heard of it being put on there for anything else other than a splash board.

CROSS EXAMINATION.

BY MR. HALL:

Q Captain, how is the engine installed in the Argo?

A Right into details, I could not tell you.

Q When did you examine it?

A I was aboard the boat the other day.

Q How long were you aboard of her?

A About half an hour.

Q Is that the only time?

A I was aboard the boat when she was building, but did not go into any of the details at that time.

Q You do not know as a matter of fact just how the engine is installed there, only in a general way?

A Yes sir. There is only one way to install an engine though.

Q Do you know whether the crank pit is lower than the floor?

A The crank pit is lower than the floor.

Q How much lower?

A I should think about probably fourteen inches.

You have to have room in the pit to swing your cranks.

Q About fourteen inches?

A I have an idea that the bed is about fourteen inches.

Q Do you know how wide the standards are apart?

A I think about two feet.

Q Did you examine this guard that was on there?

A Not particularly.

Q You saw it?

A Yes, a piece of galvanized iron.

Q Do you remember how wide the passage way is around this crank pit?

A I think about three feet, about that, that is outside of the columns.

Q Have you had considerable experience with guards or with tugs?

A I have had considerable experience with those kind of boats, have built three or four, and manager and owner of some.

Q Did you ever see a tug of the class of the Argo with a guard around her crank pit to keep the men from being thrown in there?

A I never did, no sir. We have one boat with an engine very nearly like the Argo's.

Q What is the name of the boat?

A That we have? The Camano.

Q Have you splash guards on the Camano?

A Yes sir.

Q What are they made of?

A Piece of galvanized iron.

Q How thick?

A Very light iron, about one-sixteenth.

Q Where is it fastened with reference to outside or inside of the columns?

A I don't really know which side, whether it is outside or inside, I know one of our boats was inside the columns. If you set it on the outside it lets all the oil drip, for that reason it was put on the inside of the columns.

Q Was that guard fastened at the top and bottom to the standards?

A Yes sir, it was fastened. Oh, they are not fastened very securely because they lift them off frequently.

Q How was this fastened?

A On the Camano?

Q Yes.

A Well, I think on the Camano it had a bolt there around the column coming through.

Q U-bolt at the top and bottom?

A I don't think there is any on the bottom.

Q But on the Camano you think it is on the inside?

A No, I believe it is on the outside, but on one of our boats it is on the inside.

Q Do you know whether or not the one that is on the outside (by outside you mean the side toward the columns?)

A No, I mean the side towards the passage way.

Q If you have a guard that is toward the pass-

age way, is that fastened at the bottom and at the top to the columns?

A No, it wouldn't be necessary to fasten it at the bottom if it is outside.

Q But if they are on the inside, that is toward the cranks, then they are fastened at the bottom?

A They have to be held some way there.

Q Why would it be necessary to have them fastened at the bottom?

A If your column sat that way (indicating) and your bolt was in here (indicating) it would go against the column.

Q What protection do you have on that class of tugs to keep the seamen or men employed on the boat using that passage way in a heavy sea from being thrown into the crank pit or slipping or falling in?

A So far as I know we never had any for that particular purpose.

Q The crank pit on the Camano or your other tugs, is that lower than the passage way?

A The bed is lower.

Q How much lower?

A Probably ten inches lower.

Q Is the pit lower?

A No, the pit is not lower.

Q Is it higher?

A The pit is higher on both our boats.

Q That is where it differs from the Argo?

A Yes sir.

Q If the pit were lower on a boat like the Argo,

in your opinion, would that not call for some sort of a guard to keep from slipping in there?

A I should not think it was necessary.

Q Now, if a guard is put on the outside as you call it, that is toward the passage way, and made of sheet iron fastened at the top, it serves as a guard anyway as to anybody's feet slipping in there?

A But it would not—it is light iron, it would not be heavy enough to stand very much weight against it.

Q But if it were on the inside of, that is toward the crank pit, and were not fastened at the bottom it would not serve as a guard to keep a man's feet from slipping in there?

A Sometimes. I think on that boat the columns are bolted down on the bed, the heads of the bolts stick up, and they could drop it between the heads of the bolts.

Q That would hold it in place?

A Yes.

Q And if anybody's feet went against there, it would tend to check its progress and stop him, would it?

A Certainly.

Q In your opinion, if the guard is on the inside, towards the cranks, and is not fastened at the bottom, either by putting it between the bolt heads, as you say, or fasten it with U-bolts, is that not dangerous to anybody working around there?

A There is absolutely no machinery on the boat that is not dangerous, if you get mixed up with it.

Q I refer specifically to this.

A I would not think so to a man who is used to the engine, anybody, in fact, is supposed to keep clear of the moving machinery.

Q Yes, but if you had a guard up there of sheet iron and it looked all right, you would consider that it was not so dangerous, wouldn't that put you off your guard and lead you to believe that precaution had been taken?

A I hardly think so, a man could know at a glance that a piece of an eighteenth inch iron is not very substantial.

Q What if this was one-sixteenth?

A Well, it is not very strong stuff at that.

Q If the man who built the boat testified that he recognized that a guard was in there to keep a man from being thrown in the crank pit, and he had this guard constructed and put there, you would say in that event that it was a guard and not a splash pan, wouldn't you?

A Well, if that was his evidence, yes sir. That is something I never had come up to me in that way.

Q All your guards are of sheet iron?

A Yes sir, of light sheet iron.

Q And are on the outside, towards the passage way, or inside toward the cranks, and fastened at the tops and bottoms?

A Generally fastened with temporary fastening that can be undone very easily, because they lift them off occassionally.

RE-DIRECT EXAMINATION.

BY MR. BYERS:

Q State, if you know, the general purposes for which these guards or pans are put upon engines?

A I never heard of them being put in there other than to keep the oil from splashing.

RE-CROSS EXAMINATION.

BY MR. HALL:

Q If that is true, why are they not made of other material?

A It is heavy, and about the most economical way you can fix them.

Q If you had a guard on these vessels made of substantial iron, fastened at the top and bottom, it would be impossible for a man's foot to get through there.

A I don't think there is any question about that.

Q And you would say, would you not, that if such a guard was put there that it would be safer for the men using the passage way?

A Yes sir.

BY MR. FULTON:

Q What company are you connected with?

A Inland Navigation Company.

Q Are you stockholder in that company?

A Yes sir.

Q And one of the directors or officers of the company?

A Yes sir.

Q And an operator of boats?

A Yes sir.

BY MR. HALL:

Q What is the name of your other tug?

A These are passenger boats, the Camano and Calista.

Q The part of the boat the passengers occupy,—do they use the passage way?

A No, just the employees.

Q Have you any tugs?

A No, we have no tugs.

BY MR. BYERS:

Q Are these engines installed substantially in the same manner as these tugs?

A Practically, yes sir.

Q Would the fact that that part should be put there in a way so as to keep a man from actually falling in, would that prevent him from getting hurt by that engine?

A No, not at all.

H. RAMWELL, produced as a witness on behalf of the petitioner, being first duly sworn, on oath testified as follows:

DIRECT EXAMINATION.

BY MR. BYERS:

Q State your name.

A H. Ramwell.

Q Where do you reside?

A Everett.

Q How long have you resided at Everett?

A Eleven years.

Q What is your position there, what business?

A Manager of the American Tug Boat Company.

Q Are you a licensed Master of steam vessels?

A Yes sir.

Q How long?

A Twenty years.

Q Have you built, operated and had charge of tugs of the same class and kind of the Argo?

A Yes sir. We have one just a sister ship to her. You can hardly tell them apart.

Q What is the name?

A The Irene.

Q Have you been actively engaged in and about these tugs for the last ten years?

A Yes sir.

Q Are you acquainted with that appurtenance or appliance to an engine known as a splash guard?

A Yes sir.

Q Is it customary for a guard to be constructed around and about the columns of any engine to keep firemen from getting their feet into the crank shafts?

A No sir.

Q For what purpose is this pan or guard placed there?

A To keep the oil from splashing out of the crank pit.

Q Is it put there or intended for the purpose of

keeping firemen from getting their feet into the crank pit?

A That is not the intention.

Q How many boats of practically the same kind as the Argo have you?

A We have eleven boats and tugs.

Q And operating them steadily.

A Yes sir.

CROSS EXAMINATION.

BY MR. HALL:

Q Are you familiar with the tug Argo?

A Yes sir.

A Been aboard of her?

A Yes sir.

Q When?

A O, fifty times.

Q You say you are the manager of what company?

A American Tug Boat Company.

Q You have a sister tug to the Argo called the—

A Irene, yes sir, she is the same, has the same engine, you can hardly tell them apart.

Q Is the crank pit and bed plate in the same position?

A Yes sir, exactly.

Q How much lower is that than the passage way?

A Do you mean on the Irene?

Q Yes.

A How much lower is the crank pit?

Q Yes, the bed plate.

A I should judge just about 12 or 14 inches.

Q Describe your splash guard on the Irene?

A That I can not do, we sometimes have a piece of canvas there.

Q What have you now?

A Well, I don't know.

Q When did you last see the Irene?

A About two days ago, I have so many I don't pay any attention to them.

Q Have you any that have sheet iron?

A Yes sir.

Q Are they placed on the inside or outside?

A That depends on the style of the engine, mostly on the inside.

Q That is towards the columns?

A That is inside the columns some of them have nothing but canvas.

Q Well those that you have of canvas, is the bed plate in the same position as on the Argo?

A Yes sir, just exactly the same.

Q Did you superintend the building of the tug Irene?

A No sir, I bought her.

Q Did you buy her from the builder?

A No sir.

Q Who built the Irene?

A That I don't know. Hefferman built the engine. She was built in Tacoma.

Q Whose duty in your company is it to see that things are safe around the tugs?

A I go around myself.

Q It is your duty then as manager to see that they are properly equipped?

A Yes, I do, I took to that myself. I have other men that do the same thing though.

Q Do you know then that part of your tugs with engines in the same position as the Argo practically, are without any guards whatsoever around the passage way?

A Except as a splash pan. If you put anything stronger than that the chances are they will crawl on top of it.

Q Who would?

A Anybody that works around it.

Q Doesn't this guard, that you say is made out of canvas, that affords no protection to the seamen?

A They don't need any protection. It is once in a great while a man will get his feet in a crank shaft.

Q Once is enough if he gets it in there. Did you never have a man injured in the crank shaft?

A Yes sir, he crawled on the top of the board, too, when he did it.

Q You don't mean to say that a pit with a guard such as you say you have on your tugs is as safe for the men to work around as one made of sheet iron of sufficient strength, well bolted to the standards?

A You have to keep taking them up all the time.

Q Answer my question. You don't think it is as safe for the men working around there?

A You can fix it all up so they could not get—

Q Is it as safe to have, as you claim you have, nothing but a piece of canvas, is that as safe as to have a guard of sheet iron of sufficient strength well bolted to the standards?

A No, of course it isn't.

Q You know as a matter of fact that these tugs are in heavy seas?

A Very seldom the Argo goes into heavy sea.

Q You know they are called out on heavy seas?

A No, I do not know.

Q You know it gets rough on the Sound?

A Yes sir.

Q That the boat rolls, do you?

A Yes sir.

Q You know that if a man is engaged on that passage way and the boat rolls that he stands a chance of slipping and his feet going the crank shafts?

A No, because if he is—

Q You know it is possible to be thrown in there?

A Sure, it is possible.

Q You know if we had a guard such as I described—

A It would not be practical.

Q You mean to say that you could not put a guard there?

A You seem to forget, you think the engine is put there to look at. The engine has to be oiled, the engineer has to get at it, has to get near it, if you box it up how is he going to get at it?

Q To go back to this guard that is there bolted on to the columns, it is a permanent fixture there, is it?

A No, it is not.

Q Do you say with a U-bolt it could be taken off handily?

A Yes sir.

Q You could take off a heavy guard that is fastened with a U-bolt just as readily as you could a light one?

A Sure you can.

Q Suppose he recognize the fact that there should be a guard there and he put it there for that purpose, would not you say then it was there for the purpose of a guard?

A I never saw one put—

Q Answer my question, wouldn't it be?

BY MR. BYERS: I submit it is not a proper question.

Q If the man testified that he had put it there to serve as a guard to keep the men's feet from slipping into the crank pit; that it was not safe without it, then you would say it was put there as a guard?

A Yes sir.

Q You would say further that if a guard was put there, a sheet iron guard, for the purpose of serving as a guard, and if it was put on the inside toward the cranks and fastened at the top to the standard by U-bolts, but not fastened at the bottom, then it wouldn't be a sufficient guard?

A Yes sir, because it might be slipped back of one of the nuts.

Q If it were not fastened at the bottom at all?

A It would not act as a guard or keep a man from falling in.

BY MR. BYERS: I submit, if Your Honor please, what he said it was put there for, and what it was put there for are two different questions.

A I don't know what he said it was put there for. If no one told me what it was put there for, I would naturally say it was put there for a splash pan.

Q Yes, and if the owner said it was for a guard, you would say it was for a guard?

A Yes, sure I would.

Q And if it wasn't fastened at the bottom, you would say it wasn't?

A That might be true, yes sir.

Q Did you say you have never seen a tug with a guard other than you described?

A What do you mean by that?

Q I mean did you never see a tug with any other guard except one that is used—

A But I have seen lots of them. Yes sir, we have some with boards on the outside, we have some with canvas, and usually the enginer himself puts something up to keep the oil from splashing.

Q To the best of your experience as a sea faring man, would you not say that it would be safer for an employee using that passage way to have substantial guard there than to have no guard there at all?

A No, I would not want to say that; I think that

you could box it up so that a man could not get into it, then it would be protected, but we had one man who crawled on the top of it.

Q I asked you if you would not consider it safer if this guard were made of strong enough sheet iron and fastened securely to the standard, would not that make it safer?

A Sure it would.

Q Are you interested in the Pacific Tow Boat Company?

A Not a dollar.

Q Are you acquainted with the officers?

A Know them, yes sir.

Q Have you any business with them?

A Not to the extent of a dollar. I did not know of the case until ten minutes before I came here.

Q If there were guards made of sheet iron fastened to the inside of the standards or columns and not fastened at the bottom, wouldn't that have a tendency in case any employee's feet should get against that guard and press it in towards the crank pit, to catch the employee's feet and keep him from withdrawing them from the crank pit?

A Put that again please?

Q In case—if there were a guard of sheet iron fastened on the inside of the columns at the top, but not fastened at the bottom and an employee's foot should get against there, the bottom of it, and the guard gave way, wouldn't that have a tendency to prevent him from pulling his foot out again?

A No, I don't think so.

Q Why not?

A What would it catch?

Q Wouldn't the bottom of the guard after his foot had gone in there and pressed the guard out, wouldn't that serve as a catch?

A Yes, if he got it underneath, it would.

BY MR. FULTON:

Q A piece of sheet iron fastened on the inside of the columns with U-bolts and only fastened at the top and not at the bottom wouldn't serve as a guard at all, would it?

A No.

Q It would be absolutely no protection, whatever?

A I don't think so, no.

Q If it were fastened at the top and not at the bottom, and fastened on the inside, it would be no guard at all?

A If you put heavy boiler iron and fastened it at the top he couldn't get his foot in then, but this thin sheet iron is only flimsy stuff.

Q And if it were fastened at the bottom, then it would serve as a protection?

A I think it would be just the same.

RE-DIRECT EXAMINATION.

BY MR. BYERS:

Q In regard to the statement of the manager of the company, I call your attention to that, if you heard the statement by the manager of the company that this was put here for a guard to keep the em-

ployees from getting their feet in there, after he had been displaced as manager and had been discharged as manager of the company and then called in as a witness for a claimant in damages of a case like this, then what would be your opinion?

BY MR. FULTON: We object to that question as wholly incompetent and not proper re-direct examination, and calling for conclusion of the witness upon the credibility of the witness which the court must pass upon.

BY MR. BYERS:

Q I would ask you to state then whether or not it would be your opinion that it was placed there as a guard?

BY MR. FULTON: Same objection.

A I don't think it was intended as a guard, because if he wanted to keep somebody from falling in he would put something stronger there for a guard.

HOWARD B. LOVEJOY, recalled as witness on behalf of the petitioner, testified as follows:

DIRECT EXAMINATION.

BY MR. BYERS:

Q Have you noticed other vessels of this kind and type with regard to the different ways in which their splash pans were constructed and of the different materials of which they were constructed?

A I do not recall any particular ones. I know on one we had a board, tongue and grooved stuff.

Q Have you ever seen any made out of canvas?

A I have seen them, but I could not say when or where.

Q Have you seen them made out of tin?

A No.

Q Have you ever seen the Fortuna, or the Zanthus or Atlanta?

A I've been aboard all of them, yes sir, but never noticed this particular feature.

CAPTAIN JOHN L. ANDERSON, produced as a witness on behalf of Petitioner, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. BYERS:

Q State your name.

A John L. Anderson.

Q How long have you resided at Seattle, Captain Anderson?

A About twenty-two years.

Q What is your business?

A Steamboat business.

Q How long have you been in that business?

A Well, all the time.

Q For the past twenty-two years?

A Yes sir.

Q Are you managing and operating steamboats at the present time?

A Yes sir.

Q Where?

A On Lake Washington.

Q How many?

A Eight boats.

Q Have you built steamboats?

A Yes sir.

Q Have you built steamboats of about the size approximately of the tug Argo?

A Yes sir.

Q Have you seen the tug Argo?

A Yes.

Q Have you examined her engines?

A Yes sir.

Q How long have you been engaged in the building and installation of engines in boats?

A For the last nineteen years.

Q State, Captain, whether or not the engine in the Argo is installed in approximately and practically the same way as all other vessels of her type and class?

A Yes, practically the same way as any other boat of her type.

Q Are you acquainted with what is known as a fore and aft compound engine?

A Yes sir.

Q Is that the kind of engine in the Argo?

A Yes sir.

Q Are you acquainted with the appliance made out of tin or canvas or board or of galvanized iron, that is hung or attached to each side of an engine, or around the crank pit?

A Yes sir.

Q State what that is, and what is it put there for?

A My experience, and the way I have done it, is to put iron, a sheet of iron, about one-sixteenth iron, or perhaps some metal of that kind for protecting the oil from splashing over on the engine room.

Q Is it intended by builders and operators of boats that that is to be a guard to prevent firemen from slipping their feet into the crank pit?

A No sir.

BY MR. HALL: We object to the question as incompetent, irrelevant and immaterial as to what the contrivance he describes is intended for in other boats.

Q Now, tell, Captain, how these appliances which you state are placed there for the purpose of preventing the oil from splashing, tell in what different ways they are installed on boats.

A Well sir, I always put them on the inside of the columns for the purpose of preventing oil from going over the frame, if you put them on the outside, the oil would still run out on the engine room and the floor.

CROSS EXAMINATION.

BY MR. HALL:

Q Captain Anderson, when did you say you saw the Argo, approximately, about one or two months ago?

A Sometime ago, I can't exactly remember.

Q Was it a month ago?

A Two months, probably.

Q Were you aboard of the Argo?

A Yes sir.

Q How long, at that time?

A I can not say exactly, probably half an hour.

Q She was lying at the docks?

A Yes.

Q You have been in the steamboat business twenty-two years?

A Yes sir.

Q Have you been engaged in the steamboat business in any other place besides Lake Washington?

A Yes, on Puget Sound?

Q How much experience on Puget Sound?

A Before I went on the Lake I was on some boats on the Alaska run, and I also ran to Frisco, and I put in some time on tow boats, the Queen City for one.

Q What work were you doing?

A Fireman, on the Queen City.

Q Have you Master's papers?

A Yes sir.

Q Did you get them on the Sound?

A No, I had Mate's license then.

Q How long have you been exclusively on the Lake?

A I have been there just twenty-one years.

Q On the lake twenty-one years?

A Yes sir.

Q Then your experience on the Sound was before that?

A Yes sir. After that I bought the Inland Flyer, I was up in Bellingham about six months out of that time.

Q Now, Captain, you say that the Argo is fitted out and built practically the same as all other vessels of her class?

A Yes sir.

Q What do you mean by that?

A By the engine, more particularly, as a rule they always have a boat built so that they fit in the bottom of the boat for the purpose of getting more power in towing.

Q That makes them a little lower in the crank pit?

A Than on passenger vessels, yes sir.

Q Do you have tugs on Lake Washington?

A I have had some.

Q You are not operating them now?

A No sir.

Q Mr. Byers, in describing this guard or splash pan, as he calls it, described it as sheet iron or tin, or iron, which is it on the Argo?

A I think it is one-sixteenth iron.

Q How is it fastened on the Argo?

A It was fastened on the inside of the columns when I saw it.

Q On the inside of the columns, which way was that?

A Toward the engine, it was fastened on the inside.

Q Was it fastened at the top and bottom, do you know?

A It was fastened at the top.

Q But not fastened at the bottom?

A It stands behind some studs so that they can slip it off quickly.

Q Well, you are quite positive that it was on the inside toward the cranks?

A Yes sir.

Q Were you ever on a tug or vessel of the class of the Argo that had guards up for the prevention of people or the workmen being thrown or falling into the crank pit.

A On the old Queen City she had an open column, we had a board on the side there to prevent the oil so you would not slip on it.

Q Was that a guard?

A No, it was intended for a splash pan.

Q It was intended for a guard also, wasn't it?

A I don't think so, because it was on the inside of the columns.

Q You never saw a boat with a guard around the crank pit?

A Not for guard purposes.

Q You put that always on the inside?

A I have three or four fore and aft compound engines myself; they are always on the inside of the columns.

Q Made of what?

A Iron.

Q What thickness?

A One-sixteenth; some of them thinner than that.

Q How are they fastened?

A By coupling going over the stanches, some drilled into the stanch and secured on the columns.

Q At the top and bottom?

A Yes sir.

Q Have you any guards on your boats fastened at the top but not fastened at the bottom, so when you put your foot against it it gives away?

A We have bolts on this way. (Indicating). We have the iron fitted so they go inside of the studs.

Q That serves as a brace, does it not, to keep it from going in, does it not?

A Yes sir.

Q You recognize the fact, do you not Captain, that it would require different equipment on the Sound where they get heavier weather than on the Lake?

A That is probable. We get heavy weather on the Lake.

Q Nothing compared with what it is on the Sound?

A Not always. Probably not.

Q Did you ever build a tug like the Argo?

A Why they have one of my old boats, one that I built.

Q If this sheet iron were fastened securely at the top and were fastened securely at the bottom, that would make a guard of it, wouldn't it, it would serve the purpose of a guard, would it not?

A It probably would.

Q If the man who built the tug testified that he put this guard there, ordered the guard put there for the purpose of preventing the men from slipping or falling into the crank pit, you would say it was a guard?

A No, I would not say so, I would say that the man did not know his business if he put it there for a guard.

Q What would he put there?

A Iron, about one-fourth of an inch thick and bolted well to the columns.

Q You would consider that a piece of sheet iron of the thickness of the guard that you saw on the Argo which was fastened at the top, but not fastened at the bottom, and was on the inside of the columns, would you say that that was a proper guard for the purpose of preventing the employees from slipping in or being thrown in?

A Well, I would say that it was not intended for a guard.

Q I did not ask you what it was intended for. If it was intended as a guard for the purposes that I have mentioned, would you say that it was a proper guard?

A No, it would not.

Q It would not be safe for the men around there?

A It depends on how you fix that. Naturally it is not intended for that purpose.

Q You would not say it was a proper guard?

A If it was put there for a guard it would be a foolish thing to have there.

Q It would be a negligent thing to do, would it not?

A If it was intended for that purpose.

Q Now, Captain, I will ask you this, supposing that there was a piece of sheet iron, one-sixteenth of an inch thick, fastened on the inside of the columns at the top by U-bolts on either side, but not fastened at the bottom, wouldn't that act as a sort of a trap to catch a person's foot if it was thrown against there, and when he pushed it would it not tend to catch and hold the foot in there and prevent the person from pulling it back?

A Why, I don't hardly think so, the iron is so light.

Q You couldn't pull it out as easily as if there were nothing at all there?

A Yes, because the iron is not fastened on both ends. It would be very weak and you could pull and it would stretch.

Q How could it stretch when it is fastened? It is fastened at the top, but not fastened at the bottom, it would have the same effect as closing a door on a person's foot or arm, you couldn't pull it through, pull it back?

A It would not have the same effect, one-sixteenth iron is much lighter.

Q It would tend to hold the foot to some extent, would it not?

A Well, I don't see how it could.

Q Do you understand what I am trying to get at?

A Yes sir, (indicating) the iron is here, and if you slip in, you say it would hold your foot. That depends on what position he slipped in.

Q Well, if he was walking in the passage way, and his foot slipped in there in that position?

A Well, I will tell you as a matter of fact, that the engine on that boat is better guarded than some engines, because it has a reverse shaft—

Q Just a minute. I want to know if that would not prevent you from pulling your foot out as readily as if there were none there at all?

A I don't see that it could.

Q If they had a guard on there of sheet iron fastened on the inside at the top and not fastened at the bottom, and a man should slip and his foot went through under the guard, pushing the lower part of the guard away, his foot getting into the crank pit and bruising the foot and leg so that the leg had to be amputated below the knee, that immediately afterwards, or in a week or two, the guard was changed to the outside and fastened at the top and bottom, would not that be an indication to you that it was intended as a guard instead of a splash pan?

BY MR. BYERS: We object to that question because it is improper cross examination; because the answer thereto would be immaterial, incompetent and irrelevant upon the ground and for the reason that anything that was done to this boat after the

accident or any change that is made is immaterial, incompetent and irrelevant and inadmissable.

A Well, I can't figure out what that was done for, I have no idea.

Q You say that a splash guard is always on the inside. If it were placed on the outside it would be meant for something else than a guard?

A Just changed it for some other idea.

Q In your experience it would not serve the purpose of a splash guard on the outside as well as on the inside?

A No sir.

Q Then it must have been used for some other purpose than a splash guard if it was placed on the outside?

A Well, I have run engines without any splash guards at all in them.

Q If it were on the outside, then of necessity it would have some other purpose than a splash guard?

A It depends on what the engineer wanted to put it there for.

Q What would he be apt to put it there for if he placed it on the outside?

A I don't know.

Q He wouldn't use it there for a splash guard, would he?

A It would keep the oil from splashing on the floor just the same.

Q Yes, but not so well as it would on the inside?

A No sir.

Q It would serve better as a guard on the outside than the inside?

A Yes, it would be stronger.

Q You are still with the Anderson Steamboat Company?

A Yes sir.

RE-DIRECT EXAMINATION.

BY MR. BYERS:

Q Captain, would it be possible for a man to put his foot into a crank pit, if there wasn't any guard there? Would it be possible for him to put his foot where the piston was revolving at the rate of 120 revolutions a minute, making the counter-balance together with the crank going through there at the rate of 240 revolutions a minute; would it be possible for him to put his foot in there and draw it out again without getting injured?

A No, I can't see how it could be possible.

Q Is it practical to put a permanent guard around these engines?

A No sir.

Q State why it is not practical?

A The reason of it is that they must be taken up frequently to adjust the motion of the cranks.

RE-CROSS EXAMINATION.

BY MR. HALL:

Q Do you mean to say that it is not practical to put a guard around this place?

A Yes sir, it is practical all right, but you must

have it so that you can take it down and repair and fix your engine.

Q If you were trying to put a guard there to keep people from falling in, you could do it all right?

A It can be done, but it has to be fixed so that you can take it down easily.

Q You could put one in there you could take down?

A Yes.

Q They have to take the splash guard down, don't they?

A Yes sir.

Q If it was fastened with U-bolts at the top as that is fastened, it is considerable trouble to take that away, isn't it?

A Not very much.

Q A guard could be constructed in the same manner, couldn't it?

A Not as easily as that, no.

Q You could make one, all right, that would serve the purpose of a guard and still could be removed?

A I suppose it could be done.

Q Would it be much harder to remove this guard on the Argo if it were fastened on the bottom too?

A It takes a lot more time.

Q How much longer?

A It would take twice as long.

Q That would not be difficult to do, it would not take an unusual amount of time, would it?

A Well, they are mostly all put in that way.

Q But there is generally something to prevent them from being pushed out at the bottom, as in your boats?

A Yes sir.

RE-DIRECT EXAMINATION.

BY MR. BYERS:

Q Is it practical to make an engine safe by boxing it up?

A Yes.

Q Is it possible to make an engine absolutely safe to work around?

A An engine can not be made absolutely safe when running.

Q Is it, or is it not possible for anyone who is careful and taking care to keep from putting his foot into the crank shaft with equipment like there is in this boat, the Argo?

A Certainly. I have been trying to figure out how this man got in there.

RE-CROSS EXAMINATION.

BY MR. HALL:

Q You don't know how he got in there?

A No.

Q You don't know the facts connected with this accident?

A No sir.

Q Except that you inspected the boat here of late?

A That is it.

IVER NORDSTROM, Recalled as witness on behalf of the Petitioner testified as follows:

BY MR. BYERS:

Q You now have a cork foot, Iver?

A Yes sir.

BY MR. HALL:

Q Iver, are you able to wear that cork foot all of the time?

BY MR. BYERS: We object to that and move to strike it because it is not proper cross examination.

A No.

Q Explain why you are not able to wear it all the time?

BY MR. BYERS: We object to this because it is not proper cross examination, and for the reason that witness is a hostile witness.

A I am not able to wear it because I was so badly smashed up the skin has not grown back over the smashed place.

Q Does it cause you pain when you wear it?

BY MR. BYERS: We object to this because it is not proper cross examination, nothing of that kind having been asked of the witness, unless counsel makes this witness his own.

A Yes sir, it does.

Q How much of the time are you able to wear it?

BY MR. BYERS: We object to this because it is improper cross examination, nothing having been asked the witness in chief how he wore it, and witness being a hostile and adverse witness.

Q Does it cause you pain, and how much of the time are you able to wear this cork leg?

BY MR. BYERS: We object to the question because it is improper cross examination, and because witness is a hostile and adverse witness.

A I can wear it about six or seven hours a day, but have to rest the leg a couple of days afterwards.

Q What do you use when you are not able to wear the cork leg?

BY MR. BYERS: We object to this question for the same reasons heretofore assigned.

A I wear crutches.

SEPTEMBER 25, 1912, 2 O'CLOCK P. M.

JAMES F. PRIMROSE, produced a witness in behalf of the petitioner, being first duly sworn, on oath testified as follows:

DIRECT EXAMINATION.

BY MR. BYERS:

Q State your name.

A James F. Primrose.

Q Where do you reside?

A Seattle.

Q How long have you resided here?

A Eleven years.

Q What is your business?

A Superintending engineer Puget Sound Tow Boat Company.

Q How long have you been Superintending Engineer?

A Eleven years.

Q How long have you been licensed engineer?

A Twenty-six years.

Q What is the Puget Sound Tow Boat Company, how much of a company is it?

A They own ten boats.

Q It is the principal towing company on Puget Sound?

A Yes, they do most of the towing.

Q You are its port engineer, are you?

A Yes sir.

Q As such engineer, are you familiar with the installation of engines in tug boats?

A Yes sir.

Q Have you seen the tug Argo, belonging to the Pacific Tow Boat Company?

A The Argo? I have seen her, yes sir.

Q I would ask you to state whether or not you are familiar with the fore and aft compound engine?

A Yes sir.

Q Is the engine in the Argo installed practically the same as all other boats of her type and class?

A Practically, yes.

Q Are you familiar with the appliance and appurtenance of this kind known as the splash guard?

A Yes sir.

Q Are you familiar with the one on the Argo?

A Why, I have seen it.

Q State what is the purpose of that appurtenance?

A That is installed for the purpose of keeping the oil and water from splashing over on the crank pit or around the floor as the case may be, or off the other machinery.

Q Is the purpose or intent of that to keep firemen from getting their feet into the crank pit?

A No, not necessarily, that is to keep the oil and dingy water from splashing over the floor of the engine room.

Q Is it customary or practical in boats of this class to build a guard or to construct a guard for the purpose of keeping the firemen from getting their feet into the crank pit?

A It would be practical, it could be done.

Q I say, is it customary?

A No, not customary.

Q It could be done. That is, you could build a contrivance to keep a man from getting his feet in there, but could you make the machinery absolutely safe?

A No, you have to use your own judgment; a man that is working around the machinery must use his own judgment.

CROSS EXAMINATION.

BY MR. HALL:

Q You are still in the employ of the Puget Sound Tow Boat Company?

A Yes sir.

Q You are the Superintending Engineer?

A Yes sir.

Q Would that mean, Mr. Primrose, that when a tug is constructed you have charge of the construction?

A Yes sir.

Q Have any tugs been constructed while you have been Superintending Engineer?

A Three.

Q What are their names?

A Wyadda, Bahada and Tatoosh. Those have been constructed under my supervision.

Q How long since, within the past—

A 1903 is the latest.

Q When did you make an examination of the Argo?

A Probably two or three months ago, I can not state positively.

Q How complete an examination did you make?

A Went down and looked her over through the engine rooms.

Q Did you at that time examine this guard?

A Yes sir, splash plate, you mean?

Q I mean—You saw there a section or guard of sheet iron around the crank pit on one side toward the passage way?

A I saw a plate of thin sheet iron.

Q Where was that sheet iron fastened, to what was it fastened?

A To the columns.

Q On the inside towards the crank pit, or on the outside toward the passage way?

A Towards the passage way.

Q At the top and bottom, too?

A Fastened at the top, I didn't notice particularly the bottom.

Q You say, Mr. Primrose, that the engine in the Argo is installed practically the same as it is in all other tugs of the class and type of the Argo?

A Of her class, yes.

Q You say practically, that means there is some difference?

A In installation as well as difference in makes of engines.

Q Is there any difference in installation with reference to the pit being lower than the passage way in some tugs?

A Practically the same, some tugs of the larger class will be put above.

Q And in the smaller?

A All small tugs have them in the bottom of the vessel.

Q What is the difference in height between this passage around the crank pit and the bottom of the pit itself?

A It varies from 8 to 16 inches, generally.

Q What would you say the dept of this crank pit is on the Argo?

A I should say about 12 or 14 inches.

Q In your tugs, the Wyadda or the Bahada, or

the Tatoosh, are any of the crank pits lower in them like the Argo?

A They all are.

Q Are the engines in these tugs practically the same kind as in the Argo?

A Except the Tatoosh. Practically the same kind in the two first mentioned boats, the Wyada and the Bahada, a fore and aft compound engine. The engine in the Tatoosh is a larger engine, she has a triple expansion engine.

Q And therefore it would be higher?

A She is a trifle higher, yes sir.

Q Are the standards practically the same?

A Yes sir, practically the same.

Q The same distance apart?

A Yes sir.

Q What do you use for a splash guard?

A On the Wyada and the Bahada? We do not have the Bahada any more. We still have the Wyada. We have a canvas stretched across there. Just a sheet of canvas.

Q Have you any other thing across between the standards?

A Just an iron rod up above.

Q Is there an iron rod across the Argo's?

A No, hers is fastened around the columns.

Q How heavy is this iron rod?

A That is the reverse shaft, it is put there for the purpose of reversing the engines, and is made fast across the columns.

Q It serves then as a sort of protection, does it not?

A My recollection of the Argo is that she has one too above this splash pan as we call it.

Q Your splash guards, as you call them, do you put them on the inside or the outside of the columns?

A Both ways, whichever it serves best.

Q Which does it serve best.

A In some cases on the inside it serves best.

Q If the engines are practically the same, then one or the other would serve best on that particular engine, would it not?

A The engines are practically the same, but not just the same, the column would come a little bit lower down.

Q From your examination of the Argo, which side is the best to put that on?

A To keep the oil from splashing out, I should put it on the inside.

Q But used as a guard? Used as a guard, you would say it should be on the outside on the Argo?

A You would have to have something heavier than that.

Q How thick is this sheet iron on the Argo?

A Number 16, or number 18, I should judge.

Q Do you mean to say that take the thickness of sheet iron of the weight that is in the Argo and fastening it on the outside of the columns at the top and at the bottom, that it will not serve the purposes of a guard?

A No, I would not consider it a guard.

Q What is wrong with it?

A Not heavy enough.

Q What would give way about it?

A The iron would spring, it would bend.

Q Fastened at the sides, it would either have to break or give away at the fastenings, wouldn't it?

A No, it would spring at the center of it.

Q Fastened both at top and bottom?

A Yes sir, you can illustrate that here, (indicating), put a sheet of tin across between these chairs. If you press against the tin it will bend.

Q Yes, but it would break before you foot goes clear through?

A No, it would bend.

Q If it was stretched tight it would bend enough to allow a foot to go in there?

A Yes sir, thin sheet iron would. If you put pressure enough on it it will bend or stretch.

Q How can you bend a piece of sheet iron if it is fastened to something rigid at each end, how would it bend?

A With the pressure that comes against it.

Q The metal would have to stretch or give away at the fastenings, wouldn't it?

A It would bend in. If it was heavy enough it would not bend in.

Q Then in order to have a guard there, a sufficient guard, you would have to have sheet iron there of sufficient thickness so it would not bend?

A That is it, with any pressure that comes against it.

Q Even if it were fastened securely at the ends to the columns?

A That thin stuff does not fasten very securely.

Q It would have to be of sufficient thickness so it would not bend?

A Yes sir.

Q Then you would have to have steel, would you not?

A You would have to have steel probably one-eighth to three-sixteenths thick.

Q Did you ever see a guard on a vessel either passenger or tugs as this was?

A Did I ever see a guard such as we have just described?

Q Yes.

A No, I have never used one.

Q Did you ever see one?

A No, not more than a pipe rail guard.

Q What do they use on passenger boats?

A The passengers do not go around the engines.

Q You never saw any around the engines?

A No, never allowed around the engines.

Q So you never use any sort of a guard?

A Except pipe rail guards, that is all.

Q What is to prevent an employee from falling into an engine?

A A pipe rail, or anything of that kind, and his own ability to handle himself around the engine.

Q You recognize the fact that in a small boat

like the *Argo*, it often pitches when out in rough waters?

A I recognize that fact because my boats do the same thing.

Q And the men working around there are more or less liable to be thrown into the crank pit, are they not?

A Not if using judgment and taking care of themselves.

Q And even at that they are liable—

A No one is perfectly safe around an engine machinery.

Q It would be practical, would it not, that is, it could be done I believe you testified?

A I did not say it is practical.

Q If I remember right, you said it would be practical it could be done.

A I said it could be done, but it is not practical.

Q What is impractical about it?

A You would box your engine in so you could not get at it.

Q You say it is not practical to put a heavy sheet iron in the place of what was on the *Argo*?

A No, those things have to be removed all the time.

Q It is just as much trouble to remove a thin sheet iron it would be to remove a heavier one?

A No, it has not the weight. You can handle five pounds considerably easier than five hundred pounds.

Q And it would have to be fastened just the same?

A Yes, surely.

Q You recognize, however, do you not, that there should be some sort of a guard there?

A No, I don't recognize that fact at all any more than other boats. The Wyadda has not got one, the Prosper has not even a splash pan on her, she has an engine practically the same.

Q She has not got a what?

A She has not even a splash pan.

Q Why don't you have a splash pan on her?

A She does not throw hers out.

Q Have you a pipe rail there?

A No.

Q None on the Prosper at all?

A None there at all.

Q Is the Prosper practically the same as the Argo?

A Practically the same, but not indentially the same.

Q Is the crank pit on the Prosper as low as the Argo's?

A Yes sir.

Q What is the difference?

A In what respect?

Q In regard to the cranks and crank pits, the way they are located? What is the difference in the way the engines are installed, just the same?

A Practically the same, yes sir.

Q The Prosper has a passage way around the engine as the Argo?

A On the same side of the engine as the Argo, yes sir.

Q Has no pipe rail, or anything?

A No.

Q If the manager of the company testified that he recognized that there should be a guard there and that he ordered a guard to be put in and this guard was put in there for that purpose, and not as a splash guard, but to keep employees from being thrown or falling into the crank pit, would you not say then that it was put there for that purpose?

A No, I would not. I would not say it was put there, I would say the man was mistaken in the idea he had it there for.

Q If he ordered one put in there, then this was not a sufficient guard?

A No.

Q What was wrong with it?

A Too light, I told you.

Q If there was a guard there for the purpose of a guard and not a sufficient guard, though it might be used for a guard, but the purpose in putting it there was to keep the men from falling or being thrown into the crank pit, and it was made of sheet iron as on the Argo and fastened on the inside at the top, but was not fastened at the bottom, would you say that was a proper guard for the purpose for which it was intended, if it were intended as a guard?

A In the first place, I wouldn't say it was intended for a guard, and in the second place it is not a guard. You can not get me to admit it was put there for a guard, because I can not do it. If it was put there as a guard the man did not know his business in putting it there.

Q If it was put there as a guard, it was not a proper guard?

A Yes sir.

Q In the first place it was too light?

A Yes sir.

Q In the second place it was not fastened properly?

A No, it was not.

RE-DIRECT EXAMINATION.

BY MR. BYERS:

Q If the man knew his business, would he put a guard there?

A Well, I don't know, he might put it there as his own idea, but I do not use them, and I have never had any trouble.

Q Men who are acquainted with your line of business do not as a general thing use them?

A No sir.

RE-CROSS EXAMINATION.

BY MR. HALL:

Q Mr. Primrose, coming back to this proposition of a guard being put there or not, so far as men are concerned, so far as the safety of men is con-

cerned, it would be safer, would it not, if there were a guard there? By a guard I mean a guard against their falling in?

A It would be safer if the engine was boxed up entirely.

Q I asked you—I want an answer to my question.

A I am answering your question. The engine would be safer if it was boxed entirely in.

Q If there were a guard between these two standards they could not fall or slip in there?

A Not in there, they might fall over.

Q It would be possible for their feet to slip in there?

A No.

Q But it would be safer to have a guard there?

A Safer, yes sir.

BY MR. BYERS:

Q And it would be more inconvenient and more impractical?

A Not practical at all, there is no question but what if it was practical they would have it done on all engines.

BY MR. HALL:

Q It would be just as practical outside of the question of a proper guard being heavier than this guard to have a heavy sheet iron guard as to have this?

A Now, suppose anything went wrong in those boats where you have to reach into them; you have to reach into them in a hurry. If you have a lot of

heavy guards to take down, you can't do it in a hurry.

Q What would you have to do with this guard?

A If it was put in there loosely, you can take it down just that much quicker.

Q If it were fastened up the same way it would take as much time to take it down if it were light as if it were heavy?

A No, the fastenings are lighter and easier to handle. Lots of them are only tied up.

Q With respect to this guard on the Argo, now, you say you would have to reach over it or take it down?

A Yes sir.

Q If it is fastened by U-bolts you would have to unfasten them too?

A Yes sir.

Q Do your work and put it back?

A Yes.

Q What is the difference between doing this and having a heavier guard there fastened in exactly the same way?

A U-bolts in the top, but the difference would be the fastenings are heavier and slower to handle, and the guard or plate would be so much heavier to handle. It would be much more inconvenient to handle, that is all the difference.

Q It is more inconvenient to handle?

A Yes sir.

FURTHER PROCEEDINGS HAD.

On the 18th day of October, 1912, Alpheus A. Byers, Esq., Proctor for the Petitioner, and Calvin S. Hall, Esq., Proctor for the Claimant, appeared before me, and the Petitioner offered in evidence a Bill of Particulars filed by the Claimant as plaintiff in case No. 79700 in the Superior Court of the State of Washington, for King County, entitled, Ivor Nordstrom, a minor, etc., vs. Pacific Tow Boat Company, a corporation, defendant, which Bill of Particulars was received by the Commissioner, marked Exhibit A. The claimant admits that the above Bill of Particulars is a true copy filed in said case No. 79700.

The Petitioner also offered in evidence copies of Certificates of Inspection of the Steamer Argo, as follows:

1. A certificate of inspection dated November 10, 1906, for the inspection of said steamer, that being her first inspection, expiring November 10, 1907, and the same was received in evidence, marked Exhibit B.

2. A like certificate dated November 12, 1907, expiring November 12, 1908, which was received in evidence, marked Exhibit C.

3. A like certificate dated November 17, 1908, expiring November 17, 1909, which was received in evidence, marked Exhibit D.

4. A like certificate dated November 24, 1909, expiring November 24, 1910, which was received in evidence, marked Exhibit E.

Claimant objected to the introduction of these certificates on the ground that they are incompetent and immaterial.

October 19, 1912, the Petitioner, by Alpheus A. Byers, its proctor in this matter, and Calvin S. Hall, Proctor for Claimant, appeared before me. A certificate showing the names of the officers of the Pacific Tow Boat Company on November 22, 1910, dated October 19, 1912, was offered by the Petitioner and received in evidence and marked Petitioner's Exhibit F.

The said Petitioner also offered in evidence a Bill of Sale of the Steamer Argo from the Chesly Tow Boat Company to the Pacific Tow Boat Company, the Petitioner, given on the 27th day of February, 1909, certified to by the Deputy Collector of Customs, Jos. Elser, acting recording clerk, on the 19th day of October, 1912, to which is annexed a copy of the certificate of registry, all of which are received in evidence, marked Petitioner's Exhibit G.

On the part of the claimant at the suggestion of the attorney for Petitioner, it is stipulated before me that the Petitioner has paid all annual license fees due from it as a corporation to the State of Washington up to the present date.

WM. D. TOTTEN, Commr.

Indorsed: Commissioner's Report. Filed in the U. S. District Court, Western Wistriet of Washington, Oct. 28, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy.

*In the Superior Court of the State of Washing-
ton for King County*

BILL OF PARTICULARS

Comes now the plaintiff herein, by his attorneys, Higgins, Hall & Halverstadt, and furnishes herewith a bill of particulars, as required by the order of Court in the above entitled action:

First: The amount claimed by said plaintiff in his complaint for loss of time and earning capacity is Fifteen thousand dollars (\$15,000.00).

Second: Amount claimed by plaintiff in his complaint for pain and suffering is Ten thousand dollars (\$10,000.00).

HIGGINS, HALL & HALVERSTADT,
Attorneys for Plaintiff.

State of Washington,
County of King.—ss.

John C. Higgins, being first duly sworn on oath deposes and says: That he is one of the attorneys for the plaintiff in the above entitled action; that he has read the foregoing bill of particulars, knows the contents thereof and believes the same to be true.

JOHN C. HIGGINS.

Subscribed and sworn to before me this 16th day of May, 1911.

Notary Public in and for the State of Washington,
residing at Seattle.

Indorsed: Petitioner's Exhibit "A". Wm. D. Totten, Commission.

Filed in the U. S. District Court, Western Dist. of Washington, Oct. 28, 1912, Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy.

State of Washington,
County of King.—ss.

This is to certify that the officers of the Pacific Tow Boat Company on November 22, 1910, were and ever since said date have been and are Frank M. Duggan, President, W. L. Beddow, Vice-President, and J. L. Bridge, Secretary.

FRANK M. DUGGAN, President.

State of Washington,
County of King.—ss.

Frank M. Duggan, being first duly sworn, deposes and says: He is the President of the Pacific Tow Boat Company; that he has read the foregoing certificate, knows the contents thereof, and that the same is true.

FRANK M. DUGGAN.

Subscribed and sworn to before me this 19th day of October, 1912.

(SEAL) IRVIE E. DE ROY,
Notary Public in and for the State of Washington,
residing at Seattle.

Indorsed: Petitioner's Exhibit "F". Wm. D. Totten, Commissioner.

Filed in the U. S. District Court, Western Dist. of Washington, Oct. 28, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy.

THE UNITED STATES OF AMERICA
BILL OF SALE OF DOCUMENTED VESSELS

Know ye, Chesley Tow Boat Company, a corporation organized under the laws of the State of Washington, sole owner, for and in consideration of the sum of One (\$1.00) dollar, lawful money of the United States of America, to it in hand paid, before the sealing and delivery of these presents by the Pacific Tow Boat Company, a corporation organized under the laws of the State of Washington, the receipt whereof it does hereby acknowledge and is therewith fully satisfied, contented and paid, has bargained and sold and by these presents does bargain and sell unto the said Pacific Tow Boat Company, its successors and assigns, the whole of the following scows and steamers to-wit:

Steamer ARGO

together with the whole of the masts, engines, boilers, bowsprits, sails, boats, anchors, cable, tackle, furniture and all other necessities thereunto belonging; the certificate of registry or enrollment of which said scows and steamers are as follows: viz:

See copy of certificate of registry hereto attached.

To have and to hold, scows and steamers and appurtenances thereunto belonging unto the said Pa-

cific Tow Boat Company, its successors and assigns, to the sole and only proper use, benefit and behoof of it, the said Pacific Tow Boat Company, its successors and assigns forever.

In testimony whereof, the said Chesley Tow Boat Company has caused these presents to be signed by its President and Secretary and its corporate seal to be hereunto affixed this 27th day of February, in the year of our Lord, one thousand nine hundred and nine.

CHESLEY TOW BOAT COMPANY,

W. R. CHESLEY, President.

Corporate seal. J. L. BRIDGE, JR., Secy.

State of Washington,
County of King.—ss.

I, Frank P. Dow, a notary public in and for the State of Washington, residing at Seattle, in the above named county and state, duly commissioned, sworn and qualified, do hereby certify that on this 27th day of February, A. D. 1909, before me personally appeared W. R. Chesley, President, and J. L. Bridges, Jr., Secretary, to me known to be the individuals who as President and Secretary respectively of the Chesley Tow Boat Company, the corporation that executed the within instrument and acknowledged the said instrument to be the free and voluntary act and deed of the said corporation for the uses and purposes therein mentioned and on oath stated that they were authorized to exe-

cute said instrument and that the seal affixed is the corporate seal of said corporation.

Given under my hand and official seal this 27th day of February, 1909.

FRANK P. DOW.

Notary Public in and for the State of Washington,
residing at Seattle.

(SEAL)

Received for record, March 11, 1909, 9:00 A. M.
Recorded in Book 5 Misc., page 189.

JOS. ELSER,

Acting Recording Clerk.

I certify this to be a true copy of the original
Bill of Sale on file in this office.

JOS. OLSEN,

Deputy Collector.

(SEAL)

Custom House, Port Townsend, Wash., Oct. 19,
1912.

THE UNITED STATES OF AMERICA

Department of Commerce and Labor

Bureau of Navigation

Permanent Register No. 39 B.

Official No. 203652.

CERTIFICATE OF REGISTRY

In Pursuance of Chapter One, Title XLVIII,
"Regulation of Commerce and Navigation," Re-

vised Statutes of the United States, W. R. Chesley, of Seattle, Wash., President, having taken and subscribed the oath required by law, and having sworn that The Chesley Tow Boat Company, a corporation organized under the laws of the State of Washington, is the only owner of the vessel called the ARGO, of Seattle whereof Thos. T. Engleskjien is at present master, and is a citizen of the United States, and that the said vessel was built in the year 1906, at Port Blakeley, Wash., of wood, as appears by P. E. #56 issued at Port Townsend, Nov. 14, 1906; surrendered, trade changed; and said enrollment having certified that the said vessel is a St. s.; that she has one deck, one mast, a sharp head, and a round stern; that her register length is 67.1 feet, her register breadth 20 feet, her register depth 9 feet; that she measures as follows:

	Tons	100ths
Capacity under tonnage deck.....	60	51
Capacity between decks above tonnage deck	4	50
	<hr/>	
Gross tonnage.....	65	

Propelling power, 20.80.

Total Deductions.....	20	80
	<hr/>	
Net Tonnage	44	

Given under my hand and seal, at the Port of

Seattle, this 12th day of June, in the year one thousand nine hundred and seven.

E. E. KELLY,
Deputy Collector of Customs.
E. T. CHAMBERLAIN,
Commissioner of Navigation.

Indorsed: Petitioners Exhibit "G" Wm. D. Totten, Commissioner. Filed in the U. S. District Court, Western Dist. of Washington, Oct. 28, 1913. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy.

TITLE OF COURT AND CAUSE.

BYERS & BYERS, For Petitioner.
WALTER S. FULTON,
HALL & COSGROVE, For Respondent.

BY THE COURT:

On November 22, 1910, Ivor Nordstrom, while serving in the capacity of fireman on the steam tug "Argo" was severely injured, necessitating the amputation of his left leg below the knee. A passageway was maintained around the engine and crankpit, and a sheet-iron guard separated the crankpit from the passageway. Nordstrom while in the line of his employment and in going along the passageway was thrown, by a lurch of the tug, against the sheet-iron guard so that his left foot struck the bottom and

gave way, permitting his foot to extend into the crankpit and against the revolving cranks in the pit. By reason of the construction of the guard he was unable to withdraw his foot and he received his injury from the revolving cranks crushing and mangleing his left leg.

Thereafter he brought suit in the Superior Court of King County. Subsequent thereto, the Pacific Tow Boat Company, as owner of the tug "Argo," petitioned this court for a limitation of its liability, and the suit in the State Court was accordingly enjoined. Issues were made up in this Court and the testimony of the parties taken before a commissioner.

The matter came on for final hearing before the Court on the first day of December, 1912, and in addition to the oral arguments, the respective parties have submitted briefs herein. Three questions are presented—(1) The right of the Petitioner to limit its liability; (2) The right of the claimant to recover; (3) The amount of such recovery if he is entitled to recovery.

The time available to the Court will only permit a brief announcement of its conclusions in this cause which are as follows:

First:—The fact that there is but a single claimant is no bar to proceedings in admiralty under the limited liability act. The Hoffman's, 171 Fed. 455, citing all the earlier cases.

While the principal argument of claimant against the right of the petitioner to claim the benefit of the

limited liability act, was founded upon the ground that there was but one claimant, I think there are other objections occurring on the record that must be considered. The further question is, is the owner under all the facts in this case, and irrespective of there being but one claimant, entitled to claim the benefit of the limited liability act, and if not, what order should be made in the case.

It would seem that the answer to the first question depends upon the personal relations that the executive officers of the Corporation bore to the control, management and operation of the tug boat. In *La Bourgogne*, 210 U. S. 95, the Supreme Court distinguishes between mere negligence on the part of the owner and privity and knowledge. At page 122 of the opinion Chief Justice White says:

“Without seeking presently to define the exact scope of the words privity and knowledge, it is apparent from what has been said that it has been long since settled by this court that mere negligence, pure and simple, in and of itself, does not necessarily establish the existence on the part of the owner of a vessel of privity and knowledge within the meaning of the statute.”

In *The Annie Faxon*, 75 Fed. 312, Judge Gilbert seems to distinguish between defects which are apparent and of such a character as to be detected by the inspection of an unskilled person, and defects of which the owner has no knowledge and which are

not apparent to the ordinary observer, but which require for their detection the skill of an expert.

It would seem, however, from the decision in *The Republic*, 61 Fed. 109, which has often been cited with approval, that there must be some personal fault on the part of the owner before he can be deprived of the benefit of the statute. In other words, it would seem that the owner of a ship may turn its management over to competent agents and place it beyond his own personal supervision and that if he does so he may claim the benefit of the statute, even though an injury occurs from defects which are open and apparent. In view of the language of the Supreme Court of the United States I deem the latter the more correct rule.

It appears from the evidence that the tug boat was placed in charge of competent officers at all times and that none of the executive officers of the company took personal charge, control or supervision of it, nor does it appear that they were present or had notice of the defect in question. This being the case I am of the opinion that the owner is entitled to claim the benefit of the statute. In reaching this conclusion I have considered that the burden of proof is upon the owner to show a want of privity or knowledge. *McGill vs. Michigan S. C. Co.* 144 Fed. 788.

Where the owner is not entitled to claim the benefit of the statute the practice does not seem to be settled. In *re Jeremiah Smith & Sons*, 193 Fed. 395, a case similar to the present one, the decree was re-

versed by the Circuit Court of Appeals with directions to enter a decree against the owner for the damages sustained by the claimant without any limitation. On the other hand, in the case of *The Republic, supra.* a petition was dismissed by the District Court of Appeals. In *Weishshaar vs. Kimball, S. S. Co., 128 Fed 397*, from this Circuit, the judgment was reversed with directions to dismiss the petition, leaving the administratrix of the estate of the deceased at liberty to pursue her action for damages in the state court.

Second: The tug and the owner are liable in damages, beyond mere maintenance, cure and wages, where a seaman is injured in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *The Osceolo, 189 U. S. 158, 175* and cases cited.

Third: The offending shield or guard that caused the injury in this case, was an extremely dangerous contrivance, in fact a trap, and that its continued maintenance for a period of four years constituted negligence on the part of the owner within the rule above stated.

By stipulation herein it has been agreed that if the claim of the claimant shall be allowed in any other or greater sum than the sum of \$5000.00, for which a bond was theretofore filed by the petitioner, the petitioner will thereupon at the time either file an additional bond in the sum of \$3000.00, or pay toward the liquidation of the claim a sufficient

amount to liquidate the same in excess of the \$5000.00 bond up to the sum of \$8000.00, or then surrender the boat to the Court. In other words, by such stipulation the petitioner's liability is limited to the sum of \$8000.00 instead of the sum of \$5000.00.

It is urged that because the workmen's compensation act of the State of Washington allows not to exceed Fifteen Hundred Dollars for a similar injury that that amount should not be exceeded in this case. No mere money payment can ever compensate the claimant for the loss he has sustained. Keeping in view the fact that the claimant has already been paid the expenses of his cure, as far as that is possible, and the further fact that courts of admiralty are not disposed to make any such extraordinary allowance as juries in similar cases, a decree may be entered herein in claimant's favor for the sum of \$5000.00 with interest and costs.

Indorsed: Memorandum Decision. Filed in the U. S. District Court, Western Dist. of Washington, Mar. 1, 1913. Frank L. Crosby, Clerk. By E. M. L. Deputy.

TITLE OF COURT AND CAUSE.

PETITION FOR RE-EXAMINATION AND REVIEW.

Comes now the petitioner herein and moves and petitions the Court for a re-examination and review

of the above entitled action, on the ground and for the reasons:

I.

That the opinion of the Court shows that the Court over-looked the fact that it was immaterial to this cause whether the crank guard held the foot of the defendant when it was inserted therein, for the reason that the said crank was revolving at the rate of one hundred twenty (120) revolutions per minute, and that this would cause portions of said crank guard to strike the foot at the rate of two hundred forty (240) times per minute, which would render it impossible for the claimant to have withdrawn his foot whether it was retained by the so-called guard or not.

II.

That the guard was constructed and maintained at all times in substantially the same way as so-called guards are usually maintained, and that the evidence does not materially dispute or tend to qualify this, and that what is ordinarily done cannot, as a matter of law, be deemed to be negligence, but must be deemed to be the ordinary care to which an employee is entitled.

III.

That the Court has over looked the fact that it is the law that the engineers are fellow servants of the claimant and that, if it was the duty of any one to have made any change in the so-called guard, it was

the duty of the engineers and not the duty of this petitioner.

IV.

That, if the appliance was installed in practically the same manner and method as appliances in other vessels of a like character and type, that the said vessel is, as a matter of law, seaworthy.

V.

That petitioner herein has discovered new evidence which was unknown to it during the time of said hearing, and that said evidence is material and that petitioner desires that said cause be re-opened in order that said evidence may be entered.

VI.

That this petitioner desires time in order to prepare affidavits setting forth the substance of said testimony.

ATTORNEYS FOR PETITIONER.

STATE OF WASHINGTON }
COUNTY OF KING } ss.

A. L. McNeally, being first duly sworn, deposes and says: that he is Manager of the petitioner herein; that he has read the foregoing petition, known the contents thereof and that the same is true as he verily believes.

.....

Subscribed and sworn to before me this.....
day of March, 1913.

.....
Notary Public residing at Seattle, Washington.

Indorsed: Petition for re-examination and review.
Filed in the U. S. District Court, Western Dist. of
Washington, Mar. 3, 1913. Frank L. Crosby, Clerk.

TITLE OF COURT AND CAUSE.

FINAL DECREE.

This matter having come regularly on for final hearing December 1st, 1912, above named petitioner, Pacific Towboat Company, a corporation, being represented by its proctors, Messrs. Byers & Byers, and Ivor Nordstrom, claimant and respondent, by his proctors, Walter S. Fulton, Esq., and Messrs. Hall & Cosgrove, the testimony having been therefore duly and regularly taken before a commissioner and duly and regularly returned to this court, and it appearing to the court that there is only one claim arising out of the facts set forth in libellant's petition for limitation of liability and that is the claim of Ivor Nordstrom, claimant and respondent, as shown by his claim and answer on file herein; and it further appearing to the court that the parties hereto have stipulated in writing which stipulation is on file herein, that if the claim of said claimant should be allowed in any sum greater than

the sum of Five Thousand Dollars (\$5000.00) for which a bond has heretofore been filed by the petitioner then that the said petitioner would thereupon either at said time file in said court an additional bond in the sum of Three Thousand Dollars (\$3000.00) or pay toward the liquidation of said claim a sufficient amount to liquidate said claim in excess of said Five Thousand Dollar (\$5000.00) bond up to the sum of Eight Thousand Dollars (\$8000.00) or surrender the said boat to the said court, it being the intent of said parties by said stipulation that the petitioner's liability should be limited to the sum of Eight Thousand Dollars (\$8000.00) instead of Five Thousand Dollars (\$5000.00);

NOW, THEREFORE, after hearing argument of respective counsel and after reading the testimony and briefs submitted herein, it is hereby ORDERED, ADJUDGED and DECREED as follows:

FIRST, That said petitioner is entitled to limit its liability on account of claims growing out of the facts set forth in libellant's petition and answer and claim of Ivor Nordstrom, respondent and claimant, to Eight Thousand Dollars (\$8000.00) and its liability on account of said claim is hereby limited to Eight Thousand Dollars (\$8000.00).

SECOND, That the claim of said Ivor Nordstrom be and hereby is allowed in the sum of Five Thousand Dollars (\$5000.00) with interest thereon from November 22d, 1910, together with his costs.

THIRD, That said petitioner, Pacific Towboat Company, a corporation, within three (3) days from the entry of this decree shall file an additional bond in the sum of Three Thousand Dollars (\$3000.00) or within said time pay toward the liquidation of said claim a sufficient amount to liquidate the claim in excess of the Five Thousand Dollar (\$5000.00) bond heretofore filed herein or within said time surrender said boat to said court.

FOURTH, That the petitioner, the Pacific Towboat Company, a corporation, within ten (10) days from the date of this decree do pay to said claimant, Ivor Nordstrom, the sum of Five Thousand Dollars (\$5000.00) with interest thereon at legal rate from November 22d, 1910, together with his costs, or cause to be paid into the registry of this court money sufficient to discharge and pay in full the said sum so ordered.

FIFTH, That if in making the payment prescribed by this decree said Pacific Towboat Company, a corporation, elects to and does deposit said sum hereby awarded in the registry of this court in such event they shall further pay the fees and lawful charges of the clerk of this court for receiving, keeping and paying out the sums of money so deposited and said clerk is hereby ordered to distribute said moneys so deposited to said claimant and respondent.

SIXTH, That upon the petitioner herein making the payments hereby prescribed or paying the moneys hereby directed to be paid into the registry

of this court, said Ivor Nordstrom, his agents, proctors and attorneys are hereby separately restrained and enjoined from the institution and prosecution of any and all suits against the Pacific Towboat Company, a corporation, or said steam tug, "Argo" in respect of said claim.

SEVENTH, That unless an appeal be taken from this decree within the time limited by law therefor, or the payments prescribed by this decree be made, the stipulators for value and for costs on behalf of the said petitioner do cause the engagement of their stipulations to be performed, or do show cause upon a notice of four (4) days why execution should not issue against them, their goods, chattels and lands.

DATED at Seattle, Washington, March 3d, 1913.

CLINTON W. HOWARD,
Judge.

Indorsed: Final Decree. Filed in the U. S. District Court, Western Dist. of Washington, Mar. 3, 1913. Frank L. Crosby, Clerk. By E. M. L. Deputy.

TITLE OF COURT AND CAUSE.

NOTICE.

To the above named libellant, Pacific Tow Boat Company, and to Messrs. Byers & Byers, its proctors:

You and each of you will please take notice that the undersigned proctors for claimant and respondent will apply to the clerk of the above entitled court on the 8th day of March, 1913, or as soon thereafter as counsel may be heard to tax the costs in the above entitled action.

DATED at Seattle, Washington, March 7th, 1913.

HALL & COSGROVE,
WALTER S. FULTON,
Proctors for Claimant and Respondent, Ivor Nordstrom.

Copy of the within Notice received and due service of same acknowledged this 7th day of March, 1913.

BYERS & BYERS,
Attorneys for Libellant.

Indorsed: Notice. Filed in the U. S. District Court, Western Dist. of Washington, Mar. 7, 1913, Frank L. Crosby, Clerk. By E. M. L. Deputy.

TITLE OF COURT AND CAUSE.

MEMORANDUM OF COSTS AN DISBURSEMENTS TO BE TAXED AGAINST LIBELANT, PACIFIC TOW BOAT CO. IN FAVOR OF RESPONDENT AND CLAIMANT, IVOR NORDSTROM.

Clerk's fee.....	\$10.00
Commissioner's charges.....	37.40
Witness fees, W. R. Chesley, 1 day and 2 miles	1.60
Witness fees, F. R. Underwood, 1 day and 2 miles	1.60
Witness fees, Frank Brownfield, 1 day and 2 miles	1.60
Witness fees, Thomas F. Ossinger, 1 day and 2 miles	1.60
Witness fees, John S. Wright, 1 day and 2 miles	1.60
Cost of Bond.....	10.00
Proctor's fees	20.00

Total	\$85.40

UNITED STATES OF AMERICA,
 WESTERN DISTRICT OF WASHINGTON, } ss.
 NORTHERN DIVISION,

CALVIN S. HALL, being first duly sworn on oath deposes and says: I am one of the proctors for the above named claimant and respondent; I have

read the foregoing statement of Costs and disbursements, know the contents thereof and the same is a true statement of the costs and disbursements actually disbursed or necessarily incurred in the above entitled matter.

CALVIN S. HALL.

Subscribed and sworn to before me, this 7th day of March, 1913.

WILLIAM E. FROUDE.

Notary Public in and for the State of Washington,
residing at Seattle.

(SEAL)

Copy of the within Statement of Costs received and due service of same acknowledged this 7th day of March, 1913.

BYERS & BYERS,
Attorneys for Libellant.

Indorsed: Statement of Costs and Disbursements to be Taxed. Filed in the U. S. District Court, Western Dist. of Washington, Mar. 7, 1913. Frank L. Crosby, Clerk. By E. M. L. Deputy.

TITLE OF COURT AND CAUSE.

ORDER FIXING AMOUNT OF BOND
AND STAYING PROCEEDINGS.

This cause came on regularly to be heard on the application of the Petitioner herein that an Order be made fixing the amount of the Bond to stay proceedings on appeal herein, and it appearing to the Court that a bond in the sum of Seven Thousand Five Hundred Dollars (\$7500.00), with good and sufficient sureties, is a sufficient bond and that on the filing of such bond herein, the petitioner will be entitled to have proceedings stayed until the final determination of said cause in the Circuit Court of Appeals for the Ninth Circuit,

THEREFORE, IT IS BY THE COURT HEREBY ORDERED AND ADJUDGED, That the bond to stay proceedings on appeal herein be, and the same hereby is, fixed in the sum of Seven Thousand Five Hundred Dollars (\$7500.00), and IT IS FURTHER ORDERED AND ADJUDGED that on the filing of a good and sufficient bond herein within five day from the date of this Order, in the sum of Seven Thousand Five Hundred Dollars (\$7500.00), conditioned according to law, that proceedings herein be, and the same hereby are, stayed until the final determination of this cause in the Circuit Court of Appeals for the Ninth Circuit.

EDWARD E. CUSHMAN, Judge.

Dated this 8th day of March, 1913.

Indorsed: Order Fixing amount of bond and staying proceedings. Filed in the U. S. District Court, Western Dist. of Washington, Mar. 8, 1913. Frank L. Crosby, Clerk. By E. M. L. Deputy.

TITLE OF COURT AND CAUSE.

NOTICE OF SUBSTITUTION OF PROCTOR FOR PETITIONER.

To Calvin S. Hall and Walter S. Fulton, Proctors
for Ivor Nordstrom:

You and each of you will please take notice hereby of the substitution of C. H. Hanford, whose office and postoffice address is Room 212 Colman Building, Seattle, as Proctor for the above named Petitioner.

Dated April 10, 1913.

C. H. HANFORD,
Proctor for Petitioner.

O. K.

BYERS & BYERS.

Indorsed: Notice of Substitution of Proctor for Claimant. Filed in the U. S. District Court, Western Dist. of Washington, April 14, 1913. Frank L. Crosby, Clerk. By E. M. L. Deputy.

TITLE OF COURT AND CAUSE.

NOTICE OF APPEAL.

To Frank L. Crosby, Clerk of the above entitled Court, and to Ivor Nordstrom, Intervener claiming damages in the above entitled cause, and Calvin S. Hall and Walter S. Fulton, Proctors for said intervener.

You and each of you will please take notice hereby that the Pacific Tow Boat Company, a corporation of the State of Washington, owner of the tug "Argo," petitioner in the above entitled cause, appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from that part of the final decree of the United States District Court for the Western District of Washington, Northern Division, entered in said cause on the 3rd day of March, 1913, which awards damages with interest and costs to said intervener Ivor Nordstrom and requires this petitioner to file an additional bond or liquidate the claim of said intervener.

The following are the only questions which this appellant desires to have reviewed, viz:

1. Do the pleadings and evidence justify the findings and decision of the Court that the injury suffered by Ivor Nordstrom was caused by an appliance or equipment of the tug "Argo," referred to and styled in the written decision filed in said cause as "the offending shield or guard"?

2. Was the so-called shield or guard, referred to in said written decision, in fact a dangerous contrivance?

3. Do the pleadings and evidence justify the Court's findings and decision that there was continued maintenance of a dangerous contrivance on the tug "Argo"?

4. Do the pleadings and evidence justify the Court's findings and decision that continued maintenance on the tug "Argo" of a dangerous contrivance constituted negligence chargeable to her owner?

5. Was the element of negligence involved in the cause of the injury suffered by Ivor Nordstrom, chargeable entirely to one or more of his fellow servants?

6. Was the injury suffered by Ivor Nordstrom caused by an ordinary accident, comprehended in the risks which are legally deemed to be assumed by acceptance of employment in the capacity in which he was serving when the accident happened?

7. Is the amount of damages awarded to Ivor Nordstrom by the decision and decree of the District Court excessive?

8. Is the award to Ivor Nordstrom by the decision and decree of the District Court of interest from the date of his injury in addition to the damages assessed warranted by law?

Dated July 12, 1913.

C. H. HANFORD,
Proctor for Pacific Tow Boat Co.

RETURN ON SERVICE OF WRIT.

WESTERN DISTRICT OF WASHINGTON }
 UNITED STATES OF AMERICA } ss.

I hereby certify and return that I served the annexed Notice of Appeal on the therein-named Calvin S. Hall by handing to and leaving a true and correct copy thereof with Calvin S. Hall personally at Seattle, Wash., in said District on the 12th day of July, A. D. 1913.

JOSEPH R. H. JACOBY,
 U. S. Marshal.
 By H. V. R. Anderson, Deputy.

Indorsed: Notice of Appeal. Filed in the U. S. District Court, Western District of Washington, July 12, 1913. Frank L. Crosby, Clerk. By E. M. L. Deputy.

TITLE OF COURT AND CAUSE.

ASSIGNMENT OF ERRORS.

Comes now the Pacific Tow Boat Company, a corporation of the State of Washington, the petitioner in the above entitled cause and assigns the following errors in the decision and decree to be reviewed on appeal by the Circuit Court of Appeals for the Ninth Circuit in said cause, viz:

1. The District Court erred in finding and deciding that the injury suffered by Ivor Nordstrom was caused by an appliance or equipment of the tug "Argo," referred to in the Court's written decision as "the offending shield or guard".

2. The District Court erred in finding and deciding that the so-called shield or guard referred to was a dangerous contrivance.

3. The District Court erred in finding and deciding that the so-called dangerous contrivance had been continuously maintained for four years and that continuous maintainance thereof was negligence imputable to the owner of the "Argo".

4. The District Court erred in failing to find that the injury suffered by Ivor Nordstrom was caused by lurching or rolling of the Argo and by the crank of her engine which was not defective.

5. The District Court erred in failing to find that the injured suffered by Ivor Nordstrom was caused by an ordinary accident comprehended in the risks incidental to his employment and assumed by him.

6. The District Court erred in failing to find that the only negligence involved in the cause of the injury suffered by Ivor Nordstrom was chargeable entirely to a fellow servant to-wit: the engineer of the "Argo" in misplacing the so-called shield or guard and failing to keep it securely fastened; and contributory negligence of said Nordstrom.

7. The District Court erred in awarding to said Nordstrom an excessive amount of damages.

8. The District Court erred in awarding to said Nordstrom interest from the date of his injury on the \$5000.00 assessed as his damages.

9. The District Court erred in rendering a decree in favor of said Ivor Nordstrom and against the petitioner.

Dated July 12, 1913.

Respectfully submitted,

C. H. HANFORD.

Proctor for Pacific Tow Boat Company, Appellant.

Copy of within Assignment of Errors received and due service of the same acknowledged this 14th day of July, 1913.

CALVIN S. HALL
and WALTER S. FULTON,
Proctors for Ivor Nordstrom.

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, July 14, 1913. Frank L. Crosby, Clerk. By E. M. L. Deputy.

TITLE OF COURT AND CAUSE.

CERTIFICATE OF CLERK DISTRICT
COURT TO APOSTLES.

UNITED STATES OF AMERICA
WESTERN DISTRICT OF WASHINGTON } ss.

I, Frank L. Crosby, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that the foregoing and hereunto annexed two hundred and fifty-four pages, numbered from 1 to 254, inclusive, contain a full and true transcript of the records in the said District Court, made up pursuant to Section 1 of Rule 4 of Admiralty, of the United States Circuit Court of Appeals, for the Ninth Circuit, and the instructions of C. H. Hanford, Esquire, Proctor for Petitioner and Appellant, in the cause entitled In the Matter of the Petition of the Pacific Tow Boat Company, a corporation of the State of Washington, owner of the Tug "Argo," for the Limitation of Liability No. 4779.

I further certify that the costs of preparing and certifying to the foregoing and hereunto annexed Transcript of Appeal is the sum of \$106.10, and that the same has been paid to me by Proctor for Petitioner and Appellant.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court this 26th day of July, 1913, and of the Independence of the United States the One hundred thirty-eighth.

FRANK L. CROSBY,

(SEAL)

Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation, and OREGON-WASHING-
TON RAILROAD & NAVIGATION COM-
PANY, a Corporation,

Plaintiffs in Error,

vs.

CYRUS A. MENTZER,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Western District of Washington,
Southern Division.

FILED

SEP 27 1913

United States
Circuit Court of Appeals

For the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation, and OREGON-WASHING-
TON RAILROAD & NAVIGATION COM-
PANY, a Corporation,

Plaintiffs in Error,

VS.

CYRUS A. MENTZER,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Western District of Washington,
Southern Division.

INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

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Error Northern Pacific Railway Com-
pany.

CHARLES BEDFORD, Esquire, #419 Berlin
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E. D. HODGE, Esquire, #419 Berlin Building, Ta-
coma, Washington,

Attorneys for Plaintiff and Defendant in
Error.

Praecepta for Transcript.

To the Clerk of the Above-entitled Court:

You will please prepare copies of the following papers to constitute the transcript on appeal in the above case; the caption (excepting on the complaint), and all endorsements, verifications and acceptances of service, etc., to be omitted. Transcript to be printed pursuant to the Circuit Court of Appeals rules:

1. Amended Complaint;
2. Answer of O.-W. R. & N. Co.;
3. Answer of N. P. Ry. Co.;
4. Verdict and Interrogatory;
5. Judgment.
6. Assignments of Error;
7. Bill of Exceptions.
8. Order Settling Bill of Exceptions;
9. Order Allowing Writ of Error;
10. Cost Bond;
11. Supersedeas Bond, and
12. This Praecepta.

SULLIVAN & CHRISTIAN,
Attorneys for O.-W. R. & N. Co., Plaintiff in Error.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Jul. 21, 1913. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy." [1*]

*Page-number appearing at foot of page of original certified Record.

*In the Circuit Court of the United States, Western
District of Washington, Western Division.*

No. 1876.

CYRUS A. MENTZER,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation, and OREGON-WASHING-
TON RAILROAD & NAVIGATION COM-
PANY, a Corporation,

Defendants.

Amended Complaint.

Comes now the plaintiff herein and for cause of
action against the defendants herein alleges:

I.

That at all the times hereinafter mentioned the
defendant Northern Pacific Railway Company was,
and now is, a private corporation, organized and ex-
isting under and by virtue of the laws of the State
of ^{WISCONSIN} Washington, with offices and doing business as a
common carrier at Tacoma, Washington.

II.

That at all the times hereinafter mentioned the
Oregon-Washington Railroad & Navigation Com-
pany was, and now is, a private corporation, organ-
ized under the laws of the State of Oregon, with
offices and doing business at Tacoma, Washington.

III.

That on or about the 15th day of July, 1911, and
for some time prior thereto, the plaintiff was the

owner of a certain planing-mill, including machinery, and a large quantity of lumber, located at, or near South Tacoma, Washington, and adjacent to the right of way of said Northern Pacific Railway Company, said planing-mill, machinery and lumber being of the value of \$3,330.00.

IV.

[2]

That on or about the said 15th day of July, 1911, and for some time prior thereto, the defendant Oregon-Washington Railroad & Navigation Company, was operating trains over the railroad of said defendant Northern Pacific Railway Company, and running by the property of said plaintiff hereinafter set forth.

V.

That on or about the 15th day of July, 1911, while the trains of the defendants were running upon and over said railway of the said Northern Pacific Railway Company, and passing the property of the plaintiff, above described, one of the locomotives of the defendants was so carelessly and negligently constructed, and so carelessly and negligently operated by the servants and agents of the defendants, that sparks were emitted therefrom, which falling upon and about the building, in which the greater portion of the property of the plaintiff was located, set fire to said building and property, which fire so set spread upon and over the property of the plaintiff burning and consuming the same.

VI.

That the loss, injury and damage resulting to the

plaintiff by reason of said fire was caused by the negligent construction of the locomotives of the defendants, and the carelessness and negligence of the servants and agents of the defendants in operating the same, and in starting said fire and permitting the same to burn the said property of the plaintiff, and by reason of said negligent acts of the defendants the plaintiff has been damaged in the sum of \$3,330.00.

Wherefore plaintiff prays judgment against the defendants in the sum of \$3,330.00 and for his costs and expenses herein.

E. D. HODGE,
Attorney for Plaintiff.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Dec. 30, 1911. James C. Drake, Clerk. Albert P. Close, Deputy." [3]

**Answer of Oregon-Washington Railroad &
Navigation Company.**

Comes now the defendant, Oregon-Washington Railroad & Navigation Company, a corporation, and for answer to the complaint herein, says:

I.

It admits the allegations contained in paragraphs numbered I and II of said complaint.

II.

It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in paragraph numbered III of said complaint.

III.

It denies each and every allegation contained in

paragraphs numbered IV, V and VI of said complaint.

Wherefore, this defendant prays that it may be dismissed and go hence, and recover from the plaintiff its costs and reasonable disbursements herein.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant, Oregon-Washington Railroad & Navigation Company.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Nov. 8, 1911. James C. Drake, Clerk. Albert P. Close, Deputy." [4]

Answer of Northern Pacific Railway Company.

Comes now the Northern Pacific Railway Company and for its separate answer to the amended complaint of the plaintiff alleges as follows, to wit:

I.

For answer to paragraph I, defendant admits the allegations therein contained.

II.

For answer to paragraph II, defendant admits the allegations therein contained.

III.

For answer to paragraph III, defendant alleges that it has no knowledge concerning the ownership or value of the planing-mill, machinery and lumber therein mentioned, and therefore denies the same as alleged therein, to the extent that plaintiff be required to make proof thereof.

IV.

For answer to paragraph IV, defendant admits the allegations therein contained.

V.

For answer to paragraph V, defendant denies each and every material allegation therein contained.

VI.

For answer to paragraph VI, defendant denies each and every material allegation therein contained.

WHEREFORE, this defendant prays that plaintiff take nothing by reason of his said action and that this defendant recover its costs and disbursements herein expended.

GEO. T. REID,

J. W. QUICK,

L. B. DA PONTE,

Attorneys for Defendant, Northern Pacific Ry. Co.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Nov. 10, 1911. James C. Drake, Clerk. Albert P. Close, Deputy." [5]

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff and against the Northern Pacific and Oregon-Washington Railroad & Navigation Company, and assess plaintiff's damages at the sum of Two Thousand Dollars (\$2,000.00).

H. JASPERSON,

Foreman.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Dec. 9, 1912. Frank L. Crosby, Clerk. E. C. Ellington, Deputy." [6]

Order Granting New Trial.

Now, on motion of the defendants herein,

IT IS ORDERED that a new trial be granted in the above-entitled action; said trial to be noted for April 15, 1913, at 10:00 A. M.

Dated February 25, 1913.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Feb. 26, 1913. Frank L. Crosby, Clerk. E. C. Ellington, Deputy." [7]

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff and against the Northern Pacific Railway Company and Oregon-Washington Railroad & Navigation Company, and assess plaintiff's damage at the sum of Thirty-one Hundred and Twenty Dollars (\$3,120.00).

S. A. GIBBS, Jr.,

Foreman.

INTERROGATORY.

Q. If your verdict is in favor of the plaintiff, state whether the fire was started by sparks from the engine drawing Northern Pacific passenger train No. 301, or the engines of Northern Pacific freight train No. 680, or the engine of the O.-W. R. & N. freight train No. 691.

A. Fire was started by sparks from the engine of the O.-W. R. & N. frt. train No. 691.

S. A. GIBBS, Jr.,

Foreman.

[Endorsed]: "Filed U. S. District Court. Apr. 25, 1913. Frank L. Crosby, Clerk. E. C. Ellington, Deputy." [8]

Judgment.

This cause coming on to be heard upon motion of the plaintiff by his attorneys, E. D. Hodge and Charles Bedford, for judgment according to the verdict of the jury heretofore rendered and entered in this cause, and the Court finding that heretofore after the trial of said cause had been heard before the jury and said jury rendered their verdict thereon and found for the plaintiff and against the defendants Northern Pacific Railway Company and Oregon-Washington Railroad & Navigation Company, in the sum of \$3,120.00, which said verdict has been duly entered herein, and that the plaintiff is now entitled to have judgment entered herein according to said verdict and his motion for judgment granted:

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that the plaintiff, Cyrus A. Mentzer, have and recover judgment against the defendants Northern Pacific Railway Company and Oregon-Washington Railroad & Navigation Company in the sum of \$3,120.00, together with his costs and disbursements taxed and to be taxed herein.

Done in open court this 16th day of June, 1913.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Jun. 17, 1913. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy." [9]

*In the District Court of the United States for the
Western District of Washington, Southern Division.*

No. 1876—C.

CYRUS A. MENTZER,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation, and OREGON-WASHINGTON
RAILROAD & NAVIGATION CO., a
Corporation,

Defendants.

Bill of Exceptions.

Be it remembered that heretofore on the 23d day of April, 1913, the above cause came on for trial before the Honorable E. E. Cushman, Judge, and a jury.

E. D. Hodge and Chas. Bedford appearing as attorneys and counsel for plaintiff, and J. W. Quick appearing as attorney and counsel for defendant Northern Pacific Railway Co., and Bogle, Graves, Merritt & Bogle and Sullivan & Christian appearing as attorneys and counsel for defendant Oregon-Washington Railroad & Navigation Co.

Whereupon the following proceedings were had and testimony taken, to wit:

Stipulation [of Facts, etc.].

It was thereupon stipulated, immediately after the jury was sworn to try the case, as follows:

It is stipulated between the plaintiff and the defendant that the block sheet of the Northern Pacific and Oregon-Washington Railroad & Navigation Company may be introduced in evidence showing the running of the trains on the morning [10] of the 15th of July, 1911, showing the arrival and departure of trains at South Tacoma stations at Lake View station, being the first station south of South Tacoma, may be received in evidence as Plaintiff's Exhibit "A."

And it is further stipulated that train 691, O. & W. was a freight train, and that train No. 301, N. P. was a passenger train, and that train 680 was a Northern Pacific freight train, being a double header, that is, propelled with two engines, and further that trains Number 691 and 301 were leaving South Tacoma for Portland going south, and that train 680 was coming from Portland to Tacoma, running north.

It is further stipulated between the said parties that the Oregon-Washington Railroad & Navigation Company was running its trains over the trackage of the Northern Pacific between Tacoma and Portland, under lease with the Northern Pacific Railway Company, a trackage agreement, the property being owned by the Northern Pacific.

[Testimony of C. A. Mentzer, on His Own Behalf.]

C. A. MENTZER, the plaintiff, testified as follows:

That he was the owner of the planing-mill property described in the complaint, during the times

(Testimony of C. A. Mentzer.)

mentioned in the complaint.

That the main tracks of the Northern Pacific Railway Co. were between eight and ninety feet from the building in which his planing-mill was located.

That the contour of the land in the neighborhood of the mill was slightly upgrade to a point a few hundred feet south of where the mill was, running from north to south, and higher at the south than at the north.

That all of the property described in the complaint was destroyed by fire on the 15th day of July, 1911, and that the value of the property destroyed was \$3,295.00.

[Testimony of Thomas Whitehead, for Plaintiff.]

THOMAS WHITEHEAD, witness for plaintiff, testified as follows:

That on or about the 15th day of July, 1911, he had charge of plaintiff's planing-plant, which was burned.

That his duties were to see that everything was working right and kept in good condition. That the place was left at [11] night in such condition that there was no fire. That in the afternoon preceding the burning of the mill he took a large hose and wet down the planing plant part.

Referring to plaintiff's identification "B," he proceeded to mark the location of plaintiff's mill in the building with a white pencil.

That he left the mill on that evening at 6 o'clock P. M.

That he wet down the mill, including the floor in and around the mill, in the middle of the afternoon,

(Testimony of Thomas Whitehead.)

and at the time he left the mill was shut down.

That precautions were always taken about the mill to prevent fires by cleaning up the shavings and sweeping them up clean, and that this was done on this afternoon and evening.

That in connection with the planing-mill was an automatic grinding machine, shafting that ran the full length of the building; also that oil was kept on hand and also a storehouse for things not in use, pulleys, belting, a cooking outfit, blacksmith's outfit and a logging outfit. All these latter being kept in a room or storehouse on the premises.

Cross-examination.

That there was some lumber back in behind the planer that had been taken out of the dry kiln.

That as work was done on the lumber there were shavings and dust from the lumber.

That Horn Brothers shingle-mill machinery was in the south end of the building, and that plaintiff occupied the two story part of the mill building next to the railroad track.

Horn Brothers were operating their shingle-mill on that day, sawing shingles, which created dust, and dust which would accumulate on the rafters, sills and lumber of the building, [12] wherever dust would accumulate.

That the shingle-mill was not closed down at the time they quit operating plaintiff's planing-mill.

That the building shown on plaintiff's identification "B," being the building in which plaintiff's property was situated, was open. That the mill

(Testimony of Thomas Whitehead.)

building was from ten to twelve feet high to the eaves; that to the top of the building would be about fourteen feet, except the two story part, which would be four or five feet higher.

The dry kiln was about ten feet in height on the sides.

That there was a platform in front, eight or ten feet out toward the switch of the railroad company, and that he wet that down some time in the afternoon; that the weather was very hot at this time and dry.

[Testimony of John Horn, for Plaintiff.]

JOHN HORN, a witness for the plaintiff, testified that on the 15th day of July, 1911, he was sawing shingles and was running a shingle-mill in the building that was destroyed; that he was there during the day preceding the fire and that he closed up at 6 o'clock at night.

There was no fire in the engine at the time the shingle-mill was closed. "We practically let it go out about six o'clock."

That the next time he saw the mill after 6 o'clock was about 8 o'clock the same evening. That there was no fire in the engine at that time. That he went about the mill at this time (8 o'clock); that he was in the boiler-room with the engineer.

That the next time he saw the mill was between 12 and 1 [13] o'clock that same night, that he went through the mill at this time. (Illustrating to the jury from the map, identification "B" above re-

(Testimony of John Horn.)

ferred to.) That he went thoroughly through the mill at this time.

That he did not notice any fires around the mill at that time.

That the next time he *was the* mill was along about 3 o'clock and that it was pretty well afire then. The fire at this time was in the high building. The biggest part of it seemed to be at a point in the roof therein. (Indicated by witness.) Near the large building on the north end.

That there was no fire at the south end of the building nor at the dry kiln.

That he had been running the shingle-mill since the 1st of January, 1910, and that he was around the mill every day.

The witness was then asked the following question: State whether or not you ever saw any other fires in this immediate neighborhood set by sparks of the engines of the defendants Northern Pacific Railway Company or Oregon-Washington Railroad & Navigation Co. at any time just prior or within thirty days prior to the burning of this mill.

To this question attorneys for the defendant Oregon-Washington Railroad & Navigation Co. objected, on the grounds that it was incompetent, irrelevant and immaterial; also on the ground that the question was too general, and included both companies in the same question; also upon the ground that the admitted facts and stipulated facts showed that a particular engine which plaintiff claimed caused the injury, and that plaintiff was, therefore,

(Testimony of John Horn.)

limited, if the testimony was admissible at all to fires started by this engine, and also upon the further [14] ground that under the stipulation, Plaintiff's Exhibit "A," it appeared that plaintiff was undertaking to recover on an independent action against the Oregon-Washington Railroad & Navigation Company caused by a particular engine belonging to that company alone, and plaintiff was also undertaking to recover for the fire as being set by another and different engine belonging to the defendant Northern Pacific Railway Company; that plaintiff was undertaking to show an independent act of negligence on the part of the defendant Northern Pacific Railroad Company for which defendant Oregon-Washington Railroad & Navigation Co. was in no way responsible.

Thereupon the Court overruled the objection, at the same time saying: If at the end of the testimony there is nothing concerning sparks emitted and fires set by the negligence of your company, then you will be entitled to an instruction on that. The jury will understand that the statement of the law is as Mr. Sullivan outlined, and you will be instructed after the close of the case probably that even if you should find that an engine of the Northern Pacific Railway Company was negligently constructed, maintained or operated in the manner stated in the complaint, you could not find against the O. & W.; but if you find that the O. & W. engine was negligently constructed or equipped or maintained or operated, as described in the complaint, and the other elements

(Testimony of John Horn.)

in the case are present, even though you should find it was not the Northern Pacific, and that it had nothing to do with the fire, your verdict would be against both defendants because the Northern Pacific allowed the engine to be operated by another company over its tracks in a negligent manner, or one that was negligently constructed; so that you see the O. & W. will not be responsible [15] in this suit unless the setting of the fire is brought home to them and established by the preponderance of the evidence, that it was their engine and that it was either negligently equipped or operated.

To which ruling of the Court the defendant Oregon-Washington Railroad & Navigation Co. excepted and the exception was allowed.

An identical objection was made to this question by the defendant Northern Pacific Railway Company and this was in the same manner overruled by the Court, to which ruling defendant Northern Pacific Railway Company excepted and the exception was allowed.

Immediately following the ruling and statement by the Court and the allowance of the exceptions as above given, the question was read by the stenographer and the answer was, "Yes, sir."

Then the following question was asked the witness: State the circumstances under which that fire occurred.

Attorneys for defendant Oregon-Washington Railroad & Navigation Co. objected to this question upon all the ground made about the last preceding

(Testimony of John Horn.)

question above quoted. This objection was overruled by the Court and an exception was allowed the defendant, Oregon-Washington Railroad & Navigation Co.

The defendant Northern Pacific Railway Co. also made the same objections to this question and the same ruling was made by the Court and exception taken and allowed the defendant Northern Pacific Railway Company.

The answer of the witness was as follows: I have seen several. There was one set about thirty yards [16] from the mill and it was running pretty close to the fence where a private family was living, and I went over there and helped put it out, and also put one out right in the mill-yard; close to the mill, probably four or five days before. This other happened probably a couple of weeks before.

On cross-examination witness Horn testified that he was one of the firm of Horn Brothers, who owned and operated a shingle-mill in the building, and that he had a suit against these same companies to collect for the loss of the shingle-mill, but that this suit had been terminated.

That he did not remember the dates when he saw the fires, preceding the day of the burning of the mill; that it might have been two weeks before.

That one of the fires the railroad men and he went over and put out. That fire was started from a freight engine. That the sparks were going out of this freight engine and the grass was pretty dry. That he did not know what company the freight en-

(Testimony of John Horn.)

gine belonged to, but that he thought it was an Oregon and Washington. That he did not know for certain whether it was or not.

That he did not know whether it was a Northern Pacific train. And when asked if it could have been a Great Northern train he said he did not know. That he knew that the Great Northern operated its trains over the same tracks.

He was then asked if he had seen sparks come out of the engines of all of these three different roads. He answered that he did not remember; that he did not pay attention.

That there was a grade at or near the mill to the south and that when a train started up it would sometimes puff pretty hard. That this was when he saw sparks coming out of [17] some smokestacks. That the grass was very dry where the sparks lighted and they started fires. That this was about two weeks before the burning of the mill. That the next fire he saw prior to the burning of the mill property was close to the mill property, in the yard. That this was two or three days before the mill was destroyed. That he saw this fire when it was probably a yard square. That he did not know that he saw this fire started by an engine. That he saw the engine pass, hauling a freight train. That he did not remember what company it belonged to. That he did not know as he looked. That he did not know whether the Northern Pacific, Great Northern or Oregon-Washington Railroad & Navigation Company were operating this train or engine.

(Testimony of John Horn.)

Then he testified that there was no grass out there, but that it was shavings and shingles and that the season was a very dry one.

That the materials were all dry; that they burned pretty quick.

That he did not think this material would burn quite as quick as oil.

That he quit operating the shingle-mill at 6 o'clock, and that plaintiff's mill ceased to operate a few minutes before six.

There were four or five men in the shingle-mill and there was an engineer.

That sawdust was used as fuel in operating the shingle-mill and that shavings and sawdust from the planing-mill and shingle-mill were also used in the furnace.

That the fires in the furnace were out at 6 o'clock P. M.

That he went back to the mill about 8 o'clock P. M. [18]

That he most generally went back to lace a belt or something after the evening meal.

That the engineer was at the mill when he arrived.

That there was no fire in the engine or furnace at that time. That it was absolutely out. That he knew it, because he was right in front of the boiler, and he and the engineer were standing there talking, and if there had been any fire he would have known it. That this was one of the things that he looked out for after he went back after the evening meal.

(Testimony of John Horn.)

That he was positive that there was no fire at that time.

That he stayed around the mill at that time for fifteen or twenty minutes and then went home. That he lived almost opposite to the dry kiln. That he lived across Washington Street and up one block. That the mill was between the tracks and Washington Street.

That he went back to the mill between 12 and 1 o'clock at night. That he had not been to bed between the time he had been there at 8 o'clock and at 12.

That he happened to go down at midnight or after because he heard a whistle blowing. It sounded like a boiler was steaming up or something of that sort dragging along. That he got up and went down to see if there was anything down around the mill, but that he could not see anything, and finally found out that it was in the South Tacoma car shops or yards, which were across the tracks and north from the mill about three blocks. Probably a half a mile in length.

That when he heard the whistle he just kind of thought there was something wrong somewhere and got up to see. [19] That he knew there had not been any fire in the boilers at the shingle-mill and had not since 8 o'clock.

He was asked if he did not know that it could not possibly have been from his mill, and he answered that he thought he would take a walk down there any way, it kind of annoyed a fellow.

(Testimony of John Horn.)

Then he was asked if that was the only reason he had for going down to the mill, and answered that he could hear where the whistle was after he got down on the street, and to make sure he went on down; and when he got down the street close to the mill he knew then it was in the railroad yards and it was not at his mill.

Then he was asked as to why he went through the mill and he answered, "Just taking a walk through there." That after going through the mill thoroughly, he walked back home. That he saw nobody around the mill.

That he had insurance on his mill.

That he did not know just what time it was when he first saw the fire. That his wife woke him up and that he went down to the mill—hurried as fast as possible. That when he arrived there he got hold of a hose out of the corner of the boiler-room and went out towards the track. That he then stood on the track awhile until it got so hot that he could not stay there.

That he did not turn in the fire-alarm because his wife was telephoning the alarm in and when he came down Washington street he could see some one turning the alarm at the fire-alarm box. This was before he arrived at the mill. That he thought it was Mr. Sharman, a laundry-man, was the one at the fire-box. That he saw him turning in the alarm before he got to the mill. [20]

That there seemed to be plenty of light at that time, from the fire. That he thought it was not day-

(Testimony of John Horn.)

light, but was slightly dark.

That he did not think it got light for probably half an hour.

That he stood there on this side of the railroad until it was warm, and then he went around to the other side, and then the fire department was there.

That he did not go into the mill building at all.

That he did not save any of his machinery or stuff.

That he thought the fire department was pretty slow coming there.

That he did not remember seeing any trains pass at this time while he was there.

On redirect examination he testified that he was trying to throw water on the fire for 5, 10 or 15 minutes, and then went around to the other side.

[Testimony of Anna D. McCarthey, for Plaintiff.]

ANNA D. MCCARTHEY testified as a witness, on behalf of plaintiff, as follows:

That on or about the 15th day of July, 1911, she was at home, 58th and Hood Streets, Tacoma. That her home was just across the street from the mill; exactly opposite.

That she saw the fire that burned the mill. (She then took a pencil and marked on the plat, Identification "B," where she claimed she first saw the fire. Marked an X at the place.)

That she was just opposite, but the fire seemed to be on the other side, but in a little while it was bigger. That she could see down underneath the roof. That there did not seem to be any fire there. That it

(Testimony of Anna D. McCarthey.)

seemed to be quite dark there. [21]

That, of course, was all afire soon after.

That the direction of the wind preceding the fire was all day from the north, but towards the evening it seemed from the west. The west wind would take wind from her place across the road. The mill was on the south side, while she was on the west side. The wind would then blow over the tracks toward the mill.

Witness was then asked by plaintiff's attorneys the following question:

Now, state to the jury whether or not you ever saw any other fires set by the Oregon-Washington and Northern Pacific Railway engines in this immediate vicinity, and within about thirty days prior to the happening of this fire.

To which question attorneys for the defendant Oregon-Washington Railroad & Navigation Company objected on the grounds that it was incompetent, irrelevant and immaterial; also on the ground that the question was too general and included both companies in the same question; also upon the ground that the admitted facts and stipulated facts showed that a particular engine which plaintiff claimed caused the injury, and that plaintiff was, therefore, limited, if the testimony was admissible at all, to fires started by this same engine; also upon the further ground that under the stipulation, Plaintiff's Exhibit "A," it appeared that plaintiff was undertaking to recover on an independent action against the Oregon-Washington Railroad & Navigation Com-

(Testimony of Anna D. McCarthey.)

pany caused by a particular engine belonging to that company alone, and plaintiff was also undertaking to recover for the fire as being set by another and different engine belonging to the defendant Northern Pacific Railway Company; that plaintiff was undertaking to show an [22] *independent of* negligence on the part of the defendant Northern Pacific Railway Company for which defendant Oregon-Washington Railroad and Navigation Co. was in no way responsible.

The Court overruled the objection. To which ruling the defendant Oregon-Washington Railroad & Navigation Co. excepted and the exception was allowed.

An identical objection was made to this question by the defendant Northern Pacific Railway Company, and this was in the same manner overruled by the Court, to which ruling the defendant Northern Pacific Railway excepted and the exception was allowed.

The witness then answered: "Yes; every few days I would see fires, but they did not amount to much, because it was either put out by the engine-men themselves or section-men, or the neighbors used their hose and put them out along where I lived."

She was not sure just what time it was when she first saw this fire that burned the mill, but she knew all the midnight trains had passed. That there were none passed after they were fighting the fire.

On cross-examination the witness testified that *he* happened to see the fire first burning at the place

(Testimony of Anna D. McCarthey.)

where she had made an X, because she was asleep upstairs in the front room, and that faces the large building.

Sparks from the shingles blew over towards her place and made a noise on the house, and she thought that it was raining. It really seemed like the fire from the engines—anyway—her yard had been set afire many times, and she woke up hollering to her boy in the next room, asking him whether that was rain or what was coming down on the roof, and then he woke up and “I got up and raised the curtain and then saw that the building was [23] afire, and I said, ‘Get up, my boy, get up! We will all be burned up; the mill is afire!’ ”

That she was very much excited, and was afraid she would be burned and their house burned out. That she came downstairs, that her hose was on, and she commenced to hose off her house and around the fence, because it was cedar, and she was afraid it would burn, and she did not look at it very much afterwards.

That in a little while it was all in a big blaze and she could hear the firemen at the south end working down there; because there were seven or eight houses down there, and people excited and afraid their houses would be burned, because the wind was blowing that way.

That she did not see the fire department come. The fire department came on the other side, the south side. It came down Washington street.

That the fire being so close it caused her to move as

(Testimony of Anna D. McCarthey.)

fast as she could. That she had two houses and that to save that too. According to the wind taking the fire south, her house at the south side was in danger.

That there might have been more *first* when she first looked than she really saw in her haste. That she did not stop to examine particularly. That is, she did not just stand there and look. She got her hose and started to water the grass and surroundings.

That *first* had been set there before in the grass and everybody there was watching.

That the trainmen had put out fires when there were any. They would stay right on the crossing and puff and sent up sparks, and they would put it out, but they never got off the engines on purpose, but the section-men had several times. [24] It was all grass on the side of the road, and it was a very dry season.

That the cinders and stuff or shingles were falling on her roof during the fire. That there were lots of them.

When asked what brought them over there she said that she understood it was the water from the firemen; there was a great force, and using water from the other side.

The witness was asked if the firemen were not using water before she waked, and witness answered that she did not know, but what they were.

She thought the shingles were fanned up by the fire over there. That there were little pieces of shingle in the yard, and black cinders in the morning.

(Testimony of Anna D. McCarthy.)

Witness stated that she was awakened by shingles falling on the roof; and was then asked the following question by defendant's attorneys:

That must have been the water from the firemen putting out the fire, or the shingles and stuff from the building, and she answered: "Yes, it may have been. I don't know hardly."

Then she further stated that the wind had been blowing hard; it was not a regular storm, but it was blowing away from my place. There was a little breeze; the evening breeze and night breeze.

Then she was asked if she thought the shingles would blow against the breeze, and answered that she did not know, but that was the way it was. [25]

[Testimony of John Horn, for Plaintiff (Recalled).]

JOHN HORN was recalled as a witness for plaintiff and stated: That there was but very little wind on the evening of the fire. That it was blowing east over the railroad track towards the mill. Just a little. That there did not seem to be much when he first noticed it.

[Testimony of J. D. Banker, for Plaintiff.]

J. D. BANKER, a witness for plaintiff, testified that he had been down around plaintiff's mill. He was then asked the following question:

State whether or not at any time prior to the 15th of July, 1911, and within thirty days prior thereto, you ever saw any fires set along the tracks in this vicinity by sparks emitted from the engines of the Northern Pacific or Oregon-Washington Railroads.

(Testimony of J. D. Banker.)

The attorneys for defendant Oregon-Washington Railroad & Navigation Co. objected to this question upon the grounds that it was incompetent, irrelevant and immaterial; also on the ground that the question was too general, and included both companies in the same question; also upon the ground that the admitted facts and stipulated facts showed that a particular engine which plaintiff claimed caused the injury, and that plaintiff was, therefore, limited, if the testimony was admissible at all, to fires started by this same engine; also upon the further ground that the stipulation, Plaintiff's Exhibit "A," it appeared that plaintiff was undertaking to recover on an independent action against the Oregon-Washington Railroad & Navigation Company caused by a particular engine belonging to that company alone, and plaintiff was also undertaking to recover for the fire as being set by another and different engine belonging to the defendant Northern Pacific Railway Company; that plaintiff was undertaking to show an independent act of negligence [26] on the part of the defendant Northern Pacific Railway Company for which defendant Oregon-Washington Railroad & Navigation Co. was in no way responsible. The Court overruled the objection. To which ruling the defendant Oregon-Washington Railroad & Navigation Co. excepted and the exception was allowed.

An identical objection was made to this question by the defendant Northern Pacific Railway Company, and this was in the same manner overruled by the Court, to which ruling the defendant Northern

(Testimony of J. D. Banker.)

Pacific Railway excepted and the exception was allowed.

Then witness was immediately asked the following question: State the occurrence.

Attorneys for the defendant Oregon-Washington Railroad & Navigation Co. objected to this question upon the same grounds as they made to the last preceding question above mentioned.

Objection was overruled and exception allowed.

The defendant Northern Pacific Railway Company made the same objection on its behalf and the objection was overruled and exception allowed.

Witness answered: I saw several grass fires started.

Then witness was immediately asked the following question: Did you ever see any sparks emitted from the engines of these companies about that time?

To this question defendant Oregon-Washington Railroad & Navigation Co. made the same objection as to the last two preceding questions and the defendant Northern Pacific Railway Company made the same objection; and an objection was also made upon the ground that the question was not limited to the thirty days referred to. When Mr. Hodge, attorney for [27] plaintiff, stated that he would limit all questions to that time.

The Court overruled the objection and each defendant separately excepted to the ruling of the Court and the exceptions were separately allowed.

Witness then answered as follows: Yes, sir, on one particular instance I was at the mill to see Mr. Horn,

(Testimony of J. D. Banker.)

and a train went by and scattered considerable fire while we were on the platform; quite a lot. That at this time he and Mr. Horn were on the far side of the mill from the track; on the east side of the mill. That sparks came over the mill and settled down all around them.

Witness also stated that he was a lumber dealer by occupation.

On cross-examination witness stated that he supposed it was fifteen or twenty days that this occurrence happened before the fire that burned the mill.

That the fire was started from the engine of a pretty heavy freight train. That the engine was working hard with it; that it had to get up lots of smoke. That it was somewhat upgrade going south. The engine would be required to work pretty hard if it had stopped at the station and then started up the grade with a heavy train.

That it had been his experience with an engine working pretty hard would throw out sparks, as a rule.

That he did not know what company's train it was, whether the Northern Pacific, or Great Northern or Oregon-Washington, or what. He could not say which. That sparks at that time did not start any fire.

That the season was quite dry. [28]

That it was his idea that everything was highly inflammable about there. That it was a time for everybody to be careful about it.

(Testimony of H. S. Savage.)

On redirect the witness testified that his reference to everybody being careful applied to railway companies as well as others. That it was a hazardous time.

[Testimony of H. S. Savage, for Plaintiff.]

H. S. SAVAGE, a witness for plaintiff, testified that his business was that of transfer, fuel and general contractor.

That he had been around plaintiff's mill in South Tacoma and had had a fuel-yard near there at the time the mill was destroyed.

Witness was asked the following question by plaintiff's attorneys:

State whether or not at any time, say within thirty days, prior to July 15, 1911, at or near the vicinity of this mill, you ever saw any fires set by sparks from the engines of the Northern Pacific or Oregon & Washington Railroads.

The attorneys for the defendant Oregon-Washington Railroad & Navigation Co. objected to this question upon the grounds that it was incompetent, irrelevant and immaterial; also on the ground that the question was too general and included both companies in the same question; also upon the ground that the admitted facts and stipulated facts showed that a particular engine which plaintiff claimed caused the injury, and that plaintiff was, therefore, limited if the testimony was admissible at all, to fires started by this same engine; also upon the further ground that the stipulation, Plaintiff's Exhibit "A," it appeared that plaintiff was undertaking to recover

(Testimony of H. S. Savage.)

on an independent action against the Oregon-Washington Railroad & Navigation Company caused by a particular engine belonging to [29] that company alone, and plaintiff was also undertaking to recover for the fire as being set by another and different engine belonging to the defendant Northern Pacific Railway Company; that plaintiff was undertaking to show an independent act of negligence on the part of the defendant Northern Pacific Railway Company for which defendant Oregon-Washington Railroad & Navigation Co. was in no way responsible. The Court overruled the objection. To which ruling the defendant Oregon-Washington Railroad & Navigation Co. excepted and the exception was allowed.

An identical objection was made to this question by the defendant Northern Pacific Railway Company, and this was in the same manner overruled by the Court, to which ruling the defendant Northern Pacific Railway Company excepted and the exception was allowed.

Witness answered: Yes, sir. That he helped put some out.

On cross-examination witness was asked if he observed any fires set by the engines of the Great Northern Company and he answered as follows: I would not say what engines they were, but I saw several fires started from engines.

That he did not know whether it was the engines of the Northern Pacific, the Oregon-Washington or Great Northern. That he would not say which it was.

(Testimony of William Ebert.)

That it was a very dry time and everything was highly inflammable. [30]

[Testimony of William Ebert, for Plaintiff.]

WILLIAM EBERT, witness for plaintiff, stated that his business was street grading, and that he was engaged in that business in 1911 at South Tacoma.

That with reference to the Mentzer mill, he roomed and boarded right across the street from the dry kiln, east about 100 feet, he would judge.

That he saw the fire that burned the mill. That he could not tell what time it was, but that it was after midnight, and he would judge about half-past one, or something like that. That he was up at the time.

That he saw trains pass the mill that night going toward Portland, he thought. One was a freight and the other a passenger. That these trains were throwing up sparks. That the freight train went through first and was throwing up sparks. That there was quite a few sparks. That the size of the sparks, as near as he could tell, was about the size of a dime. That the sparks were going in the direction of the mill.

At this time he says he was on the east side of the mill; that is, on the same side of the track as the mill and further away. That ten or fifteen minutes after the freight train passed the passenger train passed. That this passenger train was throwing up

(Testimony of William Ebert.)

sparks. That the freight train was apparently pulling pretty hard.

That it was about fifteen or twenty minutes after these trains went by that he first saw the fire at the mill.

That the fire was located, when he saw it, at a place where he marked the letter "O" on Plaintiff's Exhibit "B," being in the roof.

That he could see underneath the mill. That the mill was all open. That there was no fire underneath the shed at [31] that time, and that there was no fire at the south end of the mill at that time, that he saw.

Then he was asked if anybody else was present at the time he saw the fire. He answered: He called up four or five men who were sleeping in the house with him and told them that the mill was afire.

He did not turn in any alarm.

On cross-examination he testified that the house he was living in was from ninety to one hundred feet east and south of the mill. That there was a street running between the mill and the house where he was living. That the house was just across the street from the end of the dry kiln, shown on exhibit "B." That he was sleeping upstairs. That he went to bed that evening about nine o'clock. That he waked up quite a number of times during the night.

That the way he happened to see the freight train was that he got up to go down to the closet and heard the train coming and looked out of the window to see what it was. That he saw it before he went down

(Testimony of William Ebert.)

to the closet. That at this time the train was coming along the track. It was down towards the depot. That it was probably three and a half to four blocks, somewhere along there from the mill. That he watched it two minutes, probably. That the train came up to the end of the mill while he was watching it. That he saw it throwing sparks all the way along and that it was throwing sparks when he first saw it. The sparks were about the size of a dime; and they were about the same size all the way along and that he saw them all the way. That he thought the size of a dime was about the size of the top of a finger or finger-nail. That these sparks looked to be about the size of a dime when [32] the engine was three blocks and a half or four blocks away, and that he could tell that they were as large as the end of a lead pencil; that they were larger than that.

Witness then testified that there did not look to be much difference between the size of a spark and the size of a lead pencil. That he did not pay much attention to whether the sparks were the size of a dime or not, but they looked to be. That he was sure they were bigger than a lead pencil. That he could not tell what number of sparks there were that were larger than a lead pencil, but that there were quite a few. That there were lots of sparks coming out of the engine and the engine was working hard. That he had no idea how many cars was in the train. That it might have been a quarter of a mile long or it might have been a half mile for all he knew. He did not see the tail end of it. That he was now par-

(Testimony of William Ebert.)

ticularly interested in the number of sparks it was throwing out or in the size of the sparks.

Then he testified that he went down to the toilet in the house—downstairs. That the passenger train did not go by until he came back upstairs. That he came back to the bedroom before he saw the passenger. When he first saw the passenger it was coming along by the feed-shed. This was about a black and a half, maybe two, from the mill. That that engine was throwing up a few sparks. That they did not appear to be as big as the sparks thrown by the freight. That there was not as many as from the freight. That none of these sparks were as large as a five cent piece. That some of them were as big as the end of a lead pencil. That he did not pay any particular attention to this. That after the passenger train went by he went back down to the toilet. Then he came back up [33] and after that he laid down. That he presumed he went to sleep. That he got into a drowse anyway. That he judged he was asleep or in a drowse about fifteen or twenty minutes. That the reason that he fixed this time was because he thought of going down to the toilet again. That he got up then and then is when he first saw the fire. That he then called the other boys. That they got up and came to the window and looked out.

That he could see the fire up in the roof. That he was on the opposite side of the mill from where he saw the fire.

That he had been at his rooming-house three months previous.

(Testimony of William Ebert.)

That he could see on top of the roof of the whole building.

That he did not turn in any fire-alarm, nor did the boys who were with him. Nor did they leave the room.

That he went back to bed after the fire engine arrived. That he could not say how long it was before the fire engine arrived. That he did not go down to turn in or send anybody to turn in an alarm. That he could not say why the other persons did not turn in the alarm. That the building burned pretty rapidly. [34]

That after he came up from the closet, and after seeing the train pass and laid down and snoozed awhile. After the passenger train passed. *The* waked up thinking it necessary to go to the toilet again, at which time he first saw the fire.

That he was a witness at the former trial of this case.

When asked if he did not testify in the former trial when he first came up from the closet, answered that he could not see it any other time. That if he was asked that question before he misunderstood it.

The witness was asked if he did not testify anything about lying down and taking a snooze before he *was* the fire, and he answered that he was never asked about it. That he was asked about it in another subsequent case.

The witness was asked the following question by one of defendant's attorneys:

"I will read from the former trial of the Mentzer

(Testimony of William Ebert.)

case and ask if the following did not occur: 'Q. When did you first learn that the mill was actually on fire.'

A. When I first learned it was when I came back up from the closet. Q. You saw it burning then?

A. Yes, sir, and I told the other boys that the mill was burning."

Q. That was 15 or 20 minutes after the passenger train passed? A. Yes, sir.

Didn't you so testify? The witness answered as follows: And I still testify to it now, the same.

Then he was again asked if he did not testify as read at the former trial and answered as follows:

"I testified I saw it after I came back from the closet, [35] and I do yet."

The witness was asked: Q. "You testify now that you lay down first?"

A. "That question was not asked me until the second trial."

Q. "But you were asked when you first saw the fire?"

A. "But you did not ask about the laying down. If you did I did not so understand."

"You did not look at your watch or any time-piece to see what time it was."

A. "I did not have a watch; it was broke, at the jewelers."

Q. "Do you know what time it was?"

A. "I do not."

The witness was asked the following question:

Q. "On the former trial of this case, didn't you testify: Q. Do you say you saw the mill on fire at

(Testimony of William Ebert.)

that time. A. Yes. Q. And you did not go over? A. No, sir. Q. You did not go to the fire? A. No, sir. Q. Did you turn in the fire alarm? A. I did not. Q. What was the reason you did not? A. In fact, I did not know where to go to turn it in. Q. What did you do, did you go to bed? A. I stayed by the window. Q. You went to bed; did you see anybody after the fire? A. I did,—at that time,—no, sir. Q. Afterwards, did you get up afterward? A. No, I did not lie down after that for about three-quarters of an hour, until after they got through working with the engines. I was sick myself that night and so consequently I did not get up to the fire.” Was that your testimony on the former trial?

The witness answered as follows: I did not know where to turn in the alarm.

He was then asked the following question: But the question [36] is, did you testify on the former trial as I have read to you from this record? Have I read correctly your testimony?

The witness answered: I could not say as to what you read.

Then the following question was asked: Q. Would you say that you did not lie down after seeing this fire for about three-quarters of an hour?

A. I say so yet.

Q. And did you say so then?

A. The question after the fire, that is, after I saw the fire, I did not lie down three-quarters of an hour.

Q. And that you saw the fire as soon as you came

(Testimony of William Ebert.)

back from the closet? A. Yes, sir.

Q. Now, you testify that you lay down on the bed and took a snooze before you saw the fire?

A. What is that?

Q. You testify now that after you came up from the closet you lay down on the bed and took a snooze before you saw the fire?

A. I testified to that before the same.

Q. Did you testify to that on the former trial?

A. I think I did.

Q. Well, I can't find it in the record.

A. You can't.

On redirect witness stated that after the passenger train went by that he lay down and took a sleep. That he thought he slept about fifteen or twenty minutes and then waked up again to go to the closet, and he saw the mill was on [37] fire. That it was not daylight at that time.

[Testimony of G. Begardis, for Plaintiff.]

G. BEGARDIS, a witness for the plaintiff, testified as follows: That he was in South Tacoma on the 15th of July, 1911, across the street from where the mill burned, in the same house with the witness Ebert. That he saw the mill burn.

The fire when he first saw it was on the roof. Practically in the middle, but mostly at the end. Being the same end that Ebert testified about.

That he could see underneath the roof most of the way, and that he did not notice any fire under the roof. It was not daylight.

The wind was practically in the west.

(Testimony of G. Begardis.)

On cross-examination he testified that he did not see any trains go by. That either the witness Ebert waked him up, or he waked up anyway.

That Ebert spoke about the mill being burned. And he presumed he waked him. That he got up and went to the window.

That he did not notice anybody around the building at first, but afterwards. Did not go to turn in any fire-alarm. That he did not know where the fire-alarm was. Did not know how to turn it in, if he went there.

Made no inquiry as to how to put out the fire or to get the alarm to the station. Did not think there was any telephone in the house. Did not go to the neighbors to see if they had one. Did not go out of the house or leave the room. Did not go over to see if he could do anything at the fire to protect property. That the mill could burn for all of him,—he was in no shape to go over there, anyway.

That when he first saw the fire it had got a start.

[38]

That there was quite a spot there already burned; and burned pretty fast. It was not long after the fire before persons began to get there. They came pretty rapidly.

That he did not see anybody he knew. That he thought they were firemen. And these were the people he had reference to that he saw there.

That it was burning over the peak of the roof, when he first saw the fire. On the opposite side, he could not see. He did not know how much had burned

(Testimony of G. Begardis.)

there. That he was shut off from that part of the building and that it burned quite rapidly.

[Testimony of J. W. Quick, for Plaintiff.]

J. W. QUICK, witness for plaintiff, testified that he was assistant counsel for the Northern Pacific Railway Co., that as counsel for the Northern Pacific Railway Co. he would have in his possession any reports and papers of any description made by the engineers, firemen, and conductors of the Northern Pacific Railway Co. from train known as 680, coming into South Tacoma on the morning of the 15th of July, 1911, in matters relating to that train with reference to this case.

That the engineer and the man having charge of the train did not make a regular report of the trip above referred to.

That the only reports made were special reports called for by the witness afterwards.

That the engineer did not make a report in the ordinary course of business in which he spoke of seeing the fire there as he came through South Tacoma.

In further response to questions witness testified that the engineer never made any report; that witness had heard of. That he knew of no reasons why he should. That the regular [39] form of report did not call for anything of that kind. He never saw any such report in this case and he did not think there was any made. If there was, he would have had it, and he did not have it.

[Testimony of W. C. Gillman, for Plaintiff.]

W. C. GILLMAN testified, on behalf of plaintiff, that he was a locomotive engineer working for the defendant Northern Pacific Railway Co., at the time and on the 15th day of July, 1911.

That he was the engineer on 680, coming from Portland to South Tacoma, on the morning of the 15th of July, 1911.

That there were two engineers, and he was one of them. There were two engines on the train.

That he did not make any report in the morning of this fire to the Northern Pacific Railway Co.

Thereupon the plaintiffs' attorney introduced in evidence identification "B," and it was admitted in evidence as Plaintiff's Exhibit "B," being the diagram of the building, used by witnesses in their examination.

Whereupon Mr. Bedford, attorney for plaintiff, announced that plaintiff was through with their testimony, except one witness, and they could not procure him until the following day.

It was thereupon agreed that the defendants should proceed with their testimony, reserving the right to put in a motion for a nonsuit or make other motions upon plaintiff's finally closing his case.
[40]

[Testimony of C. D. Savery, for Defendants.]

C. D. SAVERY was then called as a witness for the defendants.

He testified that he acted as stenographer in reporting the former trial of this same case. That he

(Testimony of C. D. Savery.)

could tell from the notes of the testimony that he made at the time of the trial what the testimony of Mr. Ebert was at that time.

That Ebert testified as follows; in answer to questions propounded to him:

Q. I will ask you if the following question and answer was propounded to Mr. Ebert and afterwards by him: Q. When did you first learn that the mill was actually on fire? A. When I first learned it, it was when I came back up from the closet.

A. Yes, sir.

Q. Was the following question and answer asked of him and answered by him: Q. You saw it burning then? A. Yes, sir; and I told the other boys the mill was burning.

A. Yes, sir.

Q. And the following question and answer: Q. That was 15 or 20 minutes after the passenger train passed? A. Yes, sir. A. Yes, sir.

Q. And the following question and answer: "You say you saw the mill on fire at that time? Yes? A. Yes, sir."

Q. And the following question and answer: "Q. Did you get up afterwards: No, I did not lie down after that for about three-quarters of an hour until after they quit working with the engine. I was sick myself that night and so consequently I did not get up to the fire." Was that question and answer given? A. Yes, sir.

Q. And the following question and answer: "Q. Now, how long was it before you did lie down after

(Testimony of C. D. Savery.)

you saw the fire? A. After the fire engine came I would judge about three-quarters [41] of an hour?" A. Yes, sir.

Q. And the following: Q. You were up for three-quarters of an hour? A. Somewhere about that.

A. Yes, sir.

On cross-examination by Mr. Hodge, one of plaintiff's attorneys, the witness testified further in regard to Ebert's testimony at the former trial as follows:

Q. Will you state that the answer to the question, "Did you get up afterward? A. No, I did not lie down after that for about three-quarters of an hour, until after they got to working with the engine." Was that not following and in response to prior questions which read as follows: After stating that he saw the mill afire— Q. Did you go to the fire? A. No, sir. Q. Did you turn in any fire alarm? I did not. Q. What did you do: go to bed? A. I stayed by the window. Q. You went to bed. Did you see anybody after the fire? A. I did. Q. At that time? A. No, sir, afterward."

A. Yes, sir, that is the way his testimony came.

Q. And the next question: Q. Now, how long was it before you lay down after you saw the fire? A. After the fire engine came I would judge about three-quarters of an hour. A. Somewhere about that? A. Yes, sir.

[Testimony of M. F. Brown, for Defendant Northern Pacific Railway Company.]

M. F. BROWN was then called as a witness on behalf of defendant Northern Pacific Railway Co. and examined by Mr. Quick, its attorney.

He testified that he was a locomotive engineer in the employ of that company. That he had been such engineer for over eleven years. That he had been employed by the Northern [42] Pacific since 1897. That he was at present examining locomotive-men and trainmen for promotion on the Northern Pacific.

That he was the engineer in charge of engine pulling train 301 on the night of July 15, 1911. That it was a night train composed of sleepers, heavy coaches and express and baggage, and mail car. That the size of the train was eight cars. That was the usual or normal train. That the train was going towards Portland from Tacoma and the number of the engine was 2107.

That the engine was a Pacific Type passenger, one of the largest engines the Northern Pacific had in the passenger service. That it was of sufficient size and power for the proper hauling of the train it was pulling at the time. That it was constructed, as most all of the engines are, with a netting in the front end between the smokestack and flues, to prevent sparks from coming out directly from the fire to the atmosphere. That the netting was down in the front part of the engine, in what is called the smokebox, or front end of the engine. That this netting consisted of about a four mesh, some three and some four. That the hole in the mesh would be

(Testimony of M. F. Brown.)

about the same size. The four mesh would have four openings to the inch and the three mesh would have three openings to the inch. That the wire was larger on the number three than on the number four mesh.

That the engine at that time was in first-class condition. It was practically new and just out of the shops a short time.

That he could not state in particular just how he was handling the engine when passing through South Tacoma that [43] night, but the usual manner in pulling a train or the manner of handling it each night is about the same. That the train does not stop at South Tacoma, but slowed up to pick up the mail, and we generally get orders there.

That these orders were picked up on a hoop or from a hoop handed up by the operator. Then the orders would be read, and the train would drift along slowly until the orders were read and the engineer knew what arrangements were to be made to meet trains along the road, and then start on.

That in starting he would naturally open the throttle a little and put the reverse lever from the center, and start the train easy, without jerking the passengers or the train. That he would have to apply additional steam to get up speed.

That there is a slight upgrade after leaving the station and for a short distance in going south. That it was necessary when getting up speed in going upgrade to work steam; and when this was done sparks sometimes came from the smokestack; not only at

(Testimony of M. F. Brown.)

the place referred to but at any time he worked steam.

That in his experience as an engineer he was familiar with the character of the coal used here on the west side of the mountains, also with the character of the netting used in the spark-arresters of the engine. That the spark-arrester in this engine was the same character of netting as was used here on the engines of this type. That he did not know of any spark-arrester that was used on engines of this type that would arrest all of the sparks when you are working steam.

That the name of the fireman on this train was Henry Ehlers. That he was an old, experienced fireman who had been [44] firing for several years.

That he did not observe any sparks coming from the engine on the trip referred to in unusual quantities or unusual size.

That the engine was drafted in such a manner that she did not throw sparks as much as she did later on.

That they had tried to sacrifice her steaming qualities a little for speeding, by giving her less draft, but decided afterward that the engine required more draft.

At this particular time the engine was very easy on the fire.

On cross-examination the witness testified that he examined this engine before he started out on the trip referred to. That he did not examine the spark-arrester.

He testified that the spark-arrester would be ex-

(Testimony of M. F. Brown.)

amined by the roundhouse force, and at any time it was not in good condition he would know it by the action of the engine.

That some sparks were bound to come out of the engine.

That he testified in the Allen case against the Northern Pacific and Oregon Short Line railroads about three months wherein suit was brought against these companies for setting this fire.

That he did not testify at that time that he had not seen a spark in three months come from this engine.

The following question and answers were asked on cross-examination and made by the witness:

Q. I am reading from your testimony on cross-examination: "Q. How far will sparks go from this engine while the spark-arrester is in good condition?

A. Well, to the best of my recollection for three months I remember only seeing one spark. Q. And

that was a little one, I suppose? A. Well it [45]

was not the size of a dime. Q. What called your

particular attention to that spark? A. For the simple reason that that was the only one I had seen

for so long." Is that your testimony?

A. I think very likely that it is.

Q. Then which of your testimony is correct—this or that? A. They are both, I think.

Q. You testify now that you saw sparks, and at that time you testified that you did not see sparks?

A. Well, a great many times when sparks come out, a spark may come out in the daytime but you don't see it, but you know they are coming out from

(Testimony of M. F. Brown.)

the cinders that are flying. That is the general idea or expression amongst the railroad men, that when cinders come out, they are sparks.

Q. Then you did not see sparks come out this evening?

A. No, I don't know as I did. I don't believe that I said that I did.

Q. Then your former testimony is true that you had only seen one spark in three months from this engine? A. Well, a very large spark.

Q. Where was that one?

A. That was some time after we left South Tacoma.

Q. About this same neighborhood?

A. We cannot always remember within a short distance, but it was within that vicinity.

Q. State to the jury about the size of that spark.

A. I would not venture to say. [46]

[Testimony of Henry Ehlers, for Defendant Northern Pacific Railway Company.]

HENRY EHLERS testified as a witness for the defendant Northern Pacific Railway Co.

He testified that he was in the employ of the defendant Northern Pacific Railway Co. in the capacity of fireman. That he was the fireman on engine 2107, pulling train 301 on the night of July 15, 1911.

That the witness Brown, who preceded him, was the engineer.

That witness had been a fireman since 1906 in the service almost constantly, with the exception of eleven months.

That the spark-arrester, ash-pan and deflector of

(Testimony of Henry Ehlers.)

the engine were in good condition and were handled in the usual way.

On cross-examination he testified that he did not examine the spark-arrester before starting on the run. That he would know whether it was in good condition or not because he would notice the different action of it. That if there was anything wrong with it a man that was on it every day would notice it. That it would have different action. That if there was something wrong with the spark-arrester it would either clog up and the engine would not steam, and if there were holes in it it would throw fire. If it threw fire the engine wouldn't steam.

Then witness was asked on cross-examination what different action would there be if there was a hole in there the size of a quarter of a dollar, and witness answered it would be able to throw a chunk of fire the same size as the hole.

The witness was then asked this question:
Q. What difference in the action of the engine?

Witness answered, "It would tear holes in my fire." That he could tell by his fire in the fire-box. It would tear holes right through it.

Then he was asked on cross-examination as follows:
[47]

Would they be noticeable if the holes were only half an inch in size or an inch?

The witness answered it would be different according to the size. The bigger the hole in the netting the stronger the action on the fire in a certain place.

That the netting would be in the front end of the

(Testimony of Henry Ehlers.)

engine away from the fire; that it was in the place where the draft goes through, and to some extent interferes with the draft. That the draft goes through where there is the least resistance.

That he had been on this particular run mostly for the last three years.

That he did not see the spark that Mr. Brown testified about and that he wasn't with him at that time. That he had seen sparks and had felt them also coming over the engine. That he would not say for sure that he seen these when Mr. Brown was on the engine. That Mr. Brown was generally on the engine with him.

The witness testified that he had seen sparks coming from the engine when Brown was on the engine with him and the engine did throw sparks when Brown was on it.

That the netting was never out of repair while he was on the engine, that he remembered of, and that he never did run the engine when the spark-arrester was out of repair, that he remembered of. That it was always in good condition. That he supposed the spark-arresters would get out of repair. That they were bound to. That he fired on this particular engine some months prior to the fire. [48]

**[Testimony of M. J. McMahon, for Defendant
Northern Pacific Railway Company.]**

M. J. McMAHON, a witness for the defendant Northern Pacific Railway Company, testified that he was a roundhouse foreman, located in Tacoma, in the employ of the Northern Pacific. Had been such

(Testimony of M. J. McMahon.)

foreman about 5 years at this time and had been connected with the mechanical departments of railroads for about thirty years. That there was a general inspection of engines as to their spark-arresters, ash-pans and deflectors once every six days. That a record of this inspection is kept. That he had a record of the inspection of engine 2107. That this engine was inspected on July 13, 1911. That a man by the name of Purdy made the inspection.

When last heard of Purdy was in Virginia. That he was familiar with the signature of Mr. Purdy and his handwriting and the written inspection which witness had in his hand was the writing of Purdy.

That at the top of the head of one column was the word "netting." That this referred to the netting in the front. That it had been examined. That this netting is what is called the spark-arrester. That the next column is headed "deflector plates." That this is the plat that is dropped or lowered to give the engine proper draft.

That the next column is headed "ash-pan." That this was under the grates and had to be examined.

The next column is headed "dampers." That it was connected with the ash-pan front and back.

That the record was made by the man who does the inspecting every night at 5:30, within 30 minutes, and makes the record at the close of each day's work.

In answers to questions here propounded by Mr. Hodge, one of plaintiff's attorneys, witness testified that the record was [49] made from the inspection of the engine. That he kept a book, other than

(Testimony of M. J. McMahon.)

the one witness had, not quite so large, which the inspectors carried in order to keep this one clean. That he saw that book on the evening of July 13, 1911. That he saw it most every day.

Witness then testified on direct that this record showed the inspection of the engine referred to on the 13th day of July, 1911, and the inspection showed that the netting was in bad order and the netting was repaired on that day.

The inspection also showed that the deflector plates were found in good condition and the ash-pan and dampers in good condition.

That the next inspection of engine 2107 was on the 20th day of July, 1911. That the inspection on the 20th showed that it was in good condition, as were the deflector plates and the ash-pan and the dampers.

That the netting was made of wire crossed.

Witness was then shown Identification No. 1 of defendant Northern Pacific Railway Company, a piece of wire netting, and stated that it was the company's standard front and netting. That it was the character of netting that was in this engine at the time, and in all the engines of the Northern Pacific Co. of that type at that time. That it was the type of netting generally used and was standard netting.

On cross-examination witness testified that the last inspection before the 13th of July, 1911, was on the 6th day of July, 1911. That the netting must have been out of order when it was pulling into Tacoma on the 13th of July 1911.

(Testimony of M. J. McMahon.)

He again testified that the next inspection after the 13th [50] was on July 20, 1911, and everything was found in first-class condition.

He also testified that he did not make these inspections himself. That two men were employed for that purpose and they had to rely upon their word for it, and the man was not here who made the inspection.

Then witness was asked the following question: So that if he reported O. K. and it was not O. K., how do you know it?

The witness answered as follows: I would not say right there, but it is my business to see that he does it perfectly.

Q. But if you did not examine the netting, how do you know?

A. I would not know, only I know what the man is; he would not let anything go; he knows his instructions and that is his only work. That he had to rely upon the inspector and the record made by him.

[Testimony of J. A. Donovan, for Defendant Oregon-Washington Railroad & Navigation Company.]

J. A. DONOVAN, a witness for the defendant, Oregon-Washington Railroad & Navigation Co., testified that his occupation was that of boiler-maker and that he was working for the defendant Oregon-Washington Railroad & Navigation Co. during July, 1911. That his duties in connection with the inspection and handling of engines was in the capacity of inspector of the spark arresting apparatus.

(Testimony J. A. Donovan.)

Such as netting in the front ends and stacks and ash-pans.

That if he found anything wrong it was his duty to make a record of it in the blank form and stock-book that was kept for this purpose.

That the apparatus would be repaired if anything was wrong and that would be put on record. What was the matter and the nature of the repairs. [51]

That he made inspections in Albino, Oregon. That other inspections would be made at different places on the line. He presumed at Seattle and Chehalis.

That he made a record of the condition of each engine that he inspected.

Witness was then shown a book and a page therein marked X, containing entries which purported to relate to engine 527, and was asked if the first five entries on these two pages were in his handwriting. He answered that they were not in his handwriting. That the first three entries and the fifth entry was in his handwriting, and the fourth and sixth were not in his handwriting. That he knew in whose handwriting these entries, four and six, were. That they were in the handwriting of one Fred Zintz, who was another inspector—the night inspector. That the book shown him was one he kept at the time he made the inspections.

Then he was asked to state the condition of the engine at different times in July, 1911—engine, fire apparatus, netting, etc.

Witness testified that the record of inspection of 527 in July, 1911, at Albino, on July 4th, the condi-

(Testimony J. A. Donovan.)

tion of smokestack and netting, front end, was good, and the condition of the ash-pan and netting was good. The inspection was made by me.

He also testified on July 7th and 8th he made inspections of the condition of the smokestack, netting, ash-pan, etc., was good.

He stated from these inspections made on the dates he referred to there was nothing wrong with the engine or apparatus in connection with the smokestack or arresters or spark-arresters. [52]

He further testified that these inspections were made as follows: When the engines arrived in the house the front end would be opened up, the trap-door in front taken off in front of the netting, take a light and go inside, examine the netting thoroughly from the top, and then go down at the bottom and examine it from the bottom, to give it a thorough inspection, look it all over, that is the front end part. As to the ash-pan, the inspector would go down to the ash-pan and examine that thoroughly, taking the light, if there is any dark place, and look all around and see that there is nothing the matter, no holes in it that fire could escape.

That if the inspector found anything wrong with the engine, he would report it and repair it and the repairs would be reported.

That engine No. 527 was a comparatively new engine, had not been in service very long. That this engine, 527, compared with and was equal to any engine he had ever seen. That included the spark-arresting apparatus, ash-pans and everything.

(Testimony J. A. Donovan.)

That he had been an inspector in this class of work for about thirteen years. That he was not in the employ of the defendant, Oregon-Washington Railroad & Navigation Co. at the present time. Nor had he been for over a year and a half, having severed his connection on September 30, 1911, because of a strike of the shopmen.

On cross-examination witness testified that he had inspected a great many engines in performing his duties. That in the month of July he inspected No. 524, and that a reference in the book to 525 was in his handwriting; also 528 and 529 [53] and 526, which inspections were made in the month of July, 1911. That he did inspect all engines numbers 504 to 527 during the month of July, 1911, as shown in the book he had referred to. That is, he inspected all that was put in that book.

That the reason he recalled that 527 was such a good engine was because 527 was an engine of the Mikado type. It was a noble-looking machine and it was modern. It was a modern freight engine and was well equipped. As he recalled it was equal to any freight engine at that time.

That it was not a fact that all of the 500 type of engines are Mikado engines that run out of Albino at that time.

That all the entries in the book relating to the condition of engines made by him were correct. All those which had his signature.

[Testimony of George McAlevy, for Defendants.]

GEORGE McALEVY, a witness called for both defendants, testified that he was Chief of the Tacoma Fire Department and had been for eight years, and had been a fireman for sixteen years. That the central office of the fire department in Tacoma, Washington, was at 9th and A streets.

That the city had what was known as the Game-well Electric Box-alarm system and also telephones. That when a fire-alarm was turned in at one of the boxes it gave to the department the location of the box and the corner of the street.

That he remembered the fire that burned the mill referred to in the testimony on the night of July 15, 1911. That the fire-box was at 58th and Washington Streets, which was across the street from where the building was situated that [54] burned. That it was north of the plant adjoining the property—the property at the street corner. That the alarm turned in there would report at the central office in the city. That there was a man on watch at the central office at all times and that a record was kept at the central office of the time when all alarms were turned in. That an alarm turned in at the box at 58th and Washington Streets would take about twelve seconds at the central station to get the number of the box, but that the alarm would reach the central office immediately.

That the man on watch at the central office would make a record of the time when the alarm was turned in. That he had a record of the time that the alarm

(Testimony of George McAlevy.)

was turned in from 58th and Washington Streets on the night of July 15, 1911. That this record showed the time the fire was turned in at the central office. This showed 3:50 A. M. at 58th and Washington Streets, July 15, 1911.

That the witness went to the fire after he got telephone information about what it was, and learning that it was the mill building he drove out and was there twenty-five or thirty minutes after the alarm was received.

That he was familiar with the character of the mill that burned, in a general way. That the conditions at that time of the year, that season, was very dry.

That from his experience as a fireman and the handling of fires and the observing of them starting and as to how long it would take for a fire to start on the roof of a building like the mill building if a spark alighted on it when extremely dry stated, in his opinion, it would start right away.

He stated that there was no other alarm turned in from [55] the box at 58th and Washington streets that night that he knew of.

On cross-examination witness testified that he thought the roof of the building was covered with some kind of paper. That he was not sure—that it might be shingles, but he thought it was a black paper of some kind. That he was not guessing at it that he was there and saw the paper during the fire.

That when he arrived there some portions of the mill—the southwest corner was still intact. That is, a small portion of it. That he thought the whole

(Testimony of George McAlevy.)

building was burned although he thought that a part of the roof was saved—a diagonal piece 5x20 or something like that.

That was a part of the roof he saw and was a part that was on the main building.

That it might be possible that the part he was referring to burned after he got there. He would not be exactly sure about it. But it struck him and he remembered it being a kind of black tar paper. That it was not a sort of asbestos paper.

That most of the shingled roofs were covered with a kind of skift or dust and he figured that was the condition there. That it was pretty apt to be that way. He never saw one that was free from dust.

That the time within which a spark would blaze up on a roof of that kind would depend on the starting, on the amount of wind, more or less, but if the spark did not take effect right away, or within fifteen minutes, he thought it would go out. That a spark would not lay in sawdust when there was no breeze for more than [56] fifteen minutes before it either set fire to the sawdust in that time or it would go out. It might be that a spark would lie in sawdust and smoulder for as long as an hour or two before it would blaze up if a draft of wind did not reach it.

That he did not think if this roof had sawdust on it and there was no draft of wind that a spark could have laid on this roof an hour before it blazed up. That the blaze would certainly show itself in much less time than that. In his opinion it would show it-

(Testimony of George McAlevy.)

self in from 12 to 15 minutes and be burning in good shape.

On cross-examination: Q. Referring to Identification "B," the tall building being at the north and the shorter building reaching south, the wind being in a northeasterly direction and not strong in the corner where the two buildings join, if sawdust should accumulate at this point and that sparks should drop in the sawdust where no wind would reach it at all, do you mean to state that that spark would blaze up within ten or fifteen minutes? A. I think that would be reasonable.

Then witness testified that it was not possible that a spark might lay for an hour or more as it would lay in any other sawdust, that the conditions there were somewhat changed. That the dust was not green and that it had to come up there in a sort of powder. That he did not think this would affect it any. That the paper roof would not burn as quick as shingles. That he would say the shingle roof would be more inflammable. That a spark on a shingle roof would blaze up almost instantaneously when they were dry. They were like powder, almost. [57]

[Testimony of Charles Ryan, for Defendants.]

CHARLES RYAN, a witness on behalf of both defendants, testified: That he was a city fireman and was in that business in July, 1911, and was stationed in No. 7 engine-house, South Tacoma.

That he knew where the fire was when the mill burned at 58th and Washington streets. That he

(Testimony of Charles Ryan.)

was at the fire station at South Tacoma when the alarm came in. That the alarm was received at a little before 4 o'clock. That when the alarm was received at that place the fireman hitched up and got to the fire as quick as they could. That it was about six blocks from the fire station to the mill that burned. That the motive power of getting there was horses. That they went there on a run immediately after the alarm came in. That the condition of the building at the time he reached there was that the building was on fire entirely. That it took about three minutes to get from the fire station to the mill building and this included the time of getting the water turned on. That it was about three minutes from the time the alarm was received until they had water playing on the building. That at that time the fire was all over, breaking out through the room; it was a mass of fire; the roof fell shortly after they got there. That there was fire entirely inside the building. That it was daylight and it was light when the alarm was received.

On cross-examination witness testified that the mill was totally destroyed. That from the time that he arrived there until it was totally destroyed was about twenty minutes, not over that. That the roof was all afire when the firemen got there and in twenty minutes the building was destroyed. That he did not remember that any part of the roof was left. [58] That he did not think that within thirty minutes after the fire-alarm was turned in there was

(Testimony of C. B. Lindsay.)

any part of the roof left. That he could not state definitely the character of the roof.

[Testimony of C. B. Lindsay, for Defendants.]

C. B. LINDSAY, a witness on behalf of both defendants, testified that he was a city patrolman and was such on the 15th of July, 1911, and located at South Tacoma.

The other patrolman there was a Mr. Guy. That he and Guy were patrolling South Tacoma on July 15, 1911.

That he remembered the fire when the mill burned at 58th and Washington.

That he was at South Tacoma when passenger train 301 went through at the South Tacoma depot. That he and Guy walked over to meet the train. That is to be there when the train pulled in.

That he was at the depot when the O. & W. freight went through just before the passenger. That they stayed there until two o'clock. That they were outside the depot when the trains went through and witness went into the depot immediately after the freight train pulled through.

That he did not observe any sparks coming from the engines of either of these trains.

That after passenger train 301 went south Mr. Guy made his report to the central station at two o'clock and then went south on the track as far as 58th street, which is the street where this mill was located. From there they went to Union Avenue and back north against to the business part of South Tacoma—52d and 54th streets.

(Testimony of C. B. Lindsay.)

That in going down to the depot from 58th he would not say that he and Guy ran a footrace. That they looked around South Tacoma and the Addison-Hill mill. There was a burner [59] there. That they always looked around there to pick up any hoboos and to examine empty cars. That policemen did not travel very fast anyway, especially at night.

That when they got to the mill property they did not notice any sign of fire around there. That there was no sign of it.

That they did not leave the depot until after two o'clock. That he would not say for sure at what time he next got back. That he would first make a report at 2:30. He was not very strict about the time. That sometimes it was half an hour between the time Guy reported and the time witness reported.

That after being down by the mill property they went east on 58th street to Union Avenue to the business part of town—54th and 52d streets. That then from this point he did not just remember where they went. That usually they put in their time around the main part of town.

That he remembered when the alarm was turned in, but at this time he had reported at the police station at South Tacoma, at 52d and Puget Sound, in the same building where the fire company was, where they had their headquarters and he had gone home. That he lived eight blocks from the police station. That when he went home he went into the toilet and from the toilet window he could look in the direction of the mill. When he went into the toilet he saw

(Testimony of C. B. Lindsay.)

smoke from down there—a big volume—and his first impression was that it was a garage between him and the mill. That he put on his coat and started down right away. That when he got half-way he saw the fire apparatus going up Union Avenue. This was after his 3:30 A. M. report. That he reported at the station at 3:30. That he went to the fire. That it was [60] getting at this time pretty good daylight. That the fire department got to the fire before he did.

That during the winter months the policeman found a good many hoboos on their patrol; in the summer months not so many, but there were some.

On cross-examination witness testified that he did not see any hoboos that night at all. That he never saw any hoboos in the Mentzer mill. Once in awhile they would find them in empty cars. That the mill was not an ideal place for hoboos; it was too open.

That he would say that when the freight train went out of South Tacoma it was working hard. That he did not look to see sparks. That he went right into the depot when the train went by. That it might have been shooting up sparks and he not have noticed it.

Then witness testified in answer to a question propounded by defendant's attorneys, that there was nothing to keep hoboos from roosting in the mill if they wanted to, in the condition of the weather; that it was all open. That the mill was not an ideal place to sleep. He also testified on redirect that the freight train was laboring more than freight trains

(Testimony of C. B. Lindsay.)

usually labor going up the grade from South Tacoma.

On recross-examination witness testified that he did not go down to the mill at all. That he went across the street from the mill. That a spark might have been smouldering along the south side of the building and he not notice it.

Witness also testified that he was close to the mill. That he and Guy passed right along the street, perhaps fifty feet from the mill, on the north side of the street. [61]

[Testimony of M. D. Guy, for Defendants.]

M. D. GUY, sworn as a witness on behalf of both defendants, testified that his business was that of police officer and was in July, 1911, and that he was located in South Tacoma.

That he remembered the burning of the mill at 58th and Washington streets. That he was at the South Tacoma station when passenger train 301, Northern Pacific, southbound went through.

That he was with Officer Lindsay.

That he was also there when the O. & W. freight went through. That he noticed both these trains as they went through. That he was on the outside of the station. That he did not observe the engine of either of these trains throwing sparks. That after the passenger train went through he and Lindsay went in and reported and then went south up the railroad track as far as 58th street.

That in going they looked around the South Tacoma burners when they generally found a few

(Testimony of M. D. Guy.)

hoboes at 54th and Washington and around through the box-cars and on down to 58th street. That when they got to 58th street they turned each to Union Avenue and back to the main part of town.

That he did not observe any sign of fire at the mill. That when the fire-alarm was turned in he was at the station in South Tacoma—the police station. That it took, in his opinion, about twenty to thirty minutes to go from the depot down to the mill at 58th street.

That when the alarm was turned in he was making his four o'clock report. That when the alarm was turned in he went to the fire. That he went after the fire department.

That the police station and fire station were in the [62] same building.

That when he arrived at the fire the whole building was afire.

On cross-examination witness testified that it would be pretty hard to tell where most of the fire was when he arrived—whether at the north end or at the south end. That he did not believe the dry kiln burned, and that most of the fire must have been at the north end of the mill.

That he did not see any hoboes around the mill, but there was plenty of room for them.

That the train might have been shooting up sparks after it left the depot and he not have noticed it.

That he believed he made some remark about the engineer patting his engine on its back to Mr. Lindsay when the train started from South Tacoma.

That the best of his recollection was that the train

(Testimony of M. D. Guy.)

seemed to be just ahead of 301 when he was furthest away, and when he went up to Mr. Lindsay he made some remark to that effect. That she was trying to get out of the road of 301 or something like that. He would not be positive.

On redirect the witness testified that it was nothing unusual for a freight train to labor more or less in going upgrade at that place.

That he did not see any display of sparks and large firebrands floating through the air toward this mill or in any direction.

That the part of the mill where the stack was, was covered with black paper, to the best of his recollection, but the end crosswise next to 58th street, he thought was shingles. That he did not go down to the mill but was just [63] across the street. There might have been a spark smoldering on the south side of the tall building and he not have seen it.

[Testimony of C. P. Sharman, for Defendants.]

C. P. SHARMAN, a witness on behalf of both defendants, testified that in July, 1911, he was living at 58th and Union Avenue, South Tacoma; business laundryman. That he was not connected in any way with the defendant companies.

That he remembered the fire that destroyed the mill at 58th and Washington Streets. That this house was about 200 or 175 feet from the mill.

That when he observed the fire he aroused his wife and babies and put on his pants and turned in the alarm. That he had to go about 175 to 200 feet to turn in the alarm. That the alarm-box was

(Testimony of C. P. Sharman.)

located catacorner across the street from the mill. That the fire department responded promptly to the alarm. That it was practically daylight at this time. Kind of dawn. That he never made any note of the time and did not know what time it was.

On cross-examination the witness testified that it was pretty early daylight.

That when he first saw the fire it was burning between the boiler-room and the north end—the center part of the mill. That he could see down below. That it was all afire down below and on the roof—on top of the roof—below and above. [64]

**[Testimony of G. O. Portrude, for Defendant
Northern Pacific Railway Company.]**

G. O. PORTRUDE, a witness on behalf of defendant Northern Pacific Railway Co., testified that he was in the employ of the defendant Northern Pacific Railway Co. as a locomotive engineer and was operating train on the night of July 15, 1911, train No. 680, going from Portland to Tacoma. Two engines on this train. He had the leading engine and controlled the train.

That he knew where the mill was located at 58th and Washington streets. That when he came by the mill on this trip he was not working steam because he was making a stop for the double track switch and had to stop and test the air at South Tacoma. That in coming towards Tacoma from Portland it was downgrade slightly. That neither engine was working steam.

That in passing he would be on the right side of

(Testimony of G. O. Portrude.)

the engine as to the mill. That he did not observe any fire at the mill when he passed.

On cross-examination witness testified that he did not make a report of the fire to the Northern Pacific Railway Company and he never made a report of the same, nor did he make any report to Mr. Quick or the company as to whether there was a fire there or not.

That Engineer Gillman was on the same train.

On examination by Mr. Sullivan, attorney for defendant Oregon-Washington Railroad & Navigation Co., witness testified that he left Lake View at 3:25 and got to South Tacoma about 3:35 A. M. That there was fifty or fifty-five cars in the train he was testifying about, loaded with freight. There might have been a few empties. [65]

[Testimony of J. J. Driscoll, for Defendant Oregon-Washington Railroad & Navigation Company.]

J. J. DRISCOLL, a witness called on behalf of defendant Oregon-Washington Railroad & Navigation Co., testified that he was a boiler-maker by occupation and had been for over twenty years. That during the year 1911 he was employed by the defendant Oregon-Washington Railroad & Navigation Co.

That his duties as a boiler-maker were general work, inspection of engines arriving and leaving and care of all boilers. That this included the inspection of engines in regard to the netting, fire apparatus and spark-arresters, etc. That he was located at Seattle and inspected the engines of the company during the month of July, 1911. Had inspected

(Testimony of J. J. Driscoll.)

engine 527 during that time. That he kept a record of inspections and made them in his own handwriting.

Witness on being handed a book of records of inspections looked at the page marked X under engine 527, in July, 1911, and stated that the handwriting as to the entry made on that page and the following page was his and he made the entry. That he made the inspection at the time indicated.

That on the 16th day of July, 1911, the condition of the engine, fire apparatus, netting, etc., was good, no repairs were made whatever. That the netting was good, ash-pan good, stack good, good all around, repairs made, none.

That if there had been any defects in the apparatus it would have been reported as defective, and the amount of repairs that would be made would be marked in the book.

A juror then asked him: "When did you make that report?" He answered: "I generally make those reports in the forenoon, if I have time; if I haven't I make them in the afternoon.

The same juror asked if he made the reports in the course [66] of his examination.

Witness answered that they washed their hands first. That it was a rule of the company to keep the books clean, and they generally kept a little stub-book in their overalls and made a note of the condition when the inspection was made, and if there were any repairs they made a note of that.

That at the noon hour or previous, or at 5 o'clock, they would wash their hands and make the note.

(Testimony of J. J. Driscoll.)

That in answer to a question propounded by counsel for defendant Oregon-Washington Railroad & Navigation Co. witness testified that the inspection was generally made in the forenoon. The doors of the engines were opened at 7 o'clock in the morning and given a chance to cool off.

That in the record he had produced the facts were kept exactly as they were found when the examination was made. The record was made out without receiving instructions from anyone as to what was to be done. That the boiler-maker in charge made entries without regard to any order. That the inspections had to be made every day. He made the entries in regard to this engine the same as all entries were made.

The witness testified that the actual inspection was made as follows: That the engines usually come in in the night and the inspector went on duty in the morning. The doors were opened up when the engines had to be inspected, which had not already been inspected. That as soon as the engines had cooled off the inspector would take a torch and crawl in the front door and look around the top, and see any small holes that might be in the netting; if you find a small hole, you must take a rule and measure the size [67] of the hole, and put a patch on it, and measure the size of the patch you put on there, and make a note of that fact in the stack-book. You have to keep that record, and if the engine is O. K. you mark good, in the different portions. When you get through in the front end, it is closed; you go

(Testimony of J. J. Driscoll.)

down and inspect the ash-pans, and if there is any defect it is noted in the book and what it is that is defective, and the defect is remedied before the engine is allowed to leave the house. It don't matter how bad they need an engine, they do not allow it to run or leave unless that defect is remedied. They hold it until the defect is remedied. They won't let it go out if there is a chance of any fire; that is one of the rules.

Witness testified that he is not in the employ of the company now. That he had not been in its employ since a strike on October 1, 1911. That all of the boiler-makers have remained out ever since.

That engine 527 in its fire apparatus, etc., was about the same as other engines. All of them were new. All the engines in the house at that time and for two or three months previous were new.

On cross-examination witness testified that he examined all the engines that came in during the month of July, 1911. That he examined engines No. 39, 201, 202, 204 and on down to 227 and 526. That he found all these engines in perfect condition, good condition.

Engines 201 to 208 were oil-burners, the rest were coal-burners. The oil-burners did not need much examination.

That the book would be written up, depending on the circumstances [68] and the amount of work in the shop. That if there was not much to be done it would be written up previous to noon; if there was much to be done it would be written up previous to

(Testimony of J. J. Driscoll.)

quitting time—5 o'clock. That he wrote that up from notes he made of engines at the time he inspected them.

On redirect: That the notes that he had used in his testimony were correct.

[Testimony of T. L. Hopper, for Plaintiff.]

T. L. HOPPER at this time was called as a witness on behalf of plaintiff.

He testified that he was living at South Tacoma on the 15th day of July, 1911, just across the street from the Mentzer mill. That he saw the mill burn. That he did not know the time. It was along towards morning, but wasn't daylight. That nobody called his attention to the fire. That when he first saw the fire it was on top of the roof. The two-story part of the building is at the north end of the mill—the small building was the dry kiln.

When he first saw the fire he would say it was at the north end of the mill, and a bit towards his house. He was on the opposite side of the street from the mill and the wind was kind of blowing towards his house. That he was living on Washington Street.

That he did not pay much attention to looking underneath the mill. He saw the fire on top. That he did not notice any fire below on the ground.

On cross-examination the witness testified that there was not anything that *call* his attention to the fire. He was sleeping and when he waked up everything was light and he got up to see what the matter was. [69]

(Testimony of T. L. Hopper.)

That he slept downstairs and the witnesses Ebert and Bergardis were sleeping upstairs. That he did not know whether they were up when he got up. That he didn't think Ebert was but he would not be certain. That he did not get up.

That he heard someone talking at this time upstairs; that is, a few minutes after he noticed the fire.

That he went down to the fire. That he didn't know who was at the fire when he got there. That there were quite a number there. That he didn't think the fire department was there when he first got there, but still it might have been. He would not say whether it was there when he first went out.

That he first noticed the fire coming up from the comb of the second-story part of the building, about the middle and a little to the north of the center. He thought the one-story part of the building was more than fifty or sixty feet long. That he thought the fire was on the west side of the building, kind of coming over the roof. That he didn't notice any fire in the two-story part of it and he didn't notice whether the roof of the two-story part was burning or not.

That there was not much wind blowing that night.

[Testimony of R. M. Wasson, for Defendant Oregon-Washington Railroad & Navigation Company.]

R. M. WASSON, called as a witness on behalf of defendant Oregon-Washington Railroad & Navigation Co., testified that he was a locomotive engineer, and had been such for fifteen years; was in the em-

(Testimony of R. M. Wasson.)

ploy of the O.-W. and was in its employ in July, 1911, and was in charge of that train which passed South Tacoma at 1:43 on the 15th of July, 1911, and the number of the engine was 527; the train was a freight, the class of engine the 500-class Mikado type. It was a new engine—only in the service the last of June or in June, 1911. [70]

On this trip the train was going from Tacoma to Portland, Oregon. That he operated it on leaving South Tacoma in the usual and ordinary manner. That nothing unusual happened to the spark-arrester or anything in connection with it before reaching South Tacoma or before he reached the mill.

That the engine and apparatus worked the same as all engines and apparatus worked on all of the trips and when the engine was in good repair.

That there was nothing out of order with the spark-arrester or fire apparatus or anything connected with it.

That the size of the train was probably 980 tons. That this was all an engine could take up the hill to Bailey Street, that is, without helper, and that the Oregon-Washington road only maintained one engine in Tacoma as a helper.

That the 500-type engines are rated 500-tons on this Tacoma hill. That the helper engine is rated at 480, making 980 tons we probably had in the train. There was not more than that. There might have been a little less. There was probably in that train about twenty loaded box-cars or something like that.

That he was familiar with engine 527, the same as he was with all engines of the 500-class. That

(Testimony of R. M. Wasson.)

he had ran one of them regularly all the time. That he considered the engine an extremely safe engine as far as throwing out sparks, etc., was concerned, on account of the extremely large nozzle those engines are equipped with and the large heating surface of the fire-box and the size of the netting, etc.

That he would consider it a great deal safer than a majority of the engines used. That he did not observe that this engine emitted any large sparks or atoms or materials after [71] *after* leaving South Tacoma. There was nothing out of the usual. That all engines would throw up some sparks, all coal-burners at times, but that he did not notice anything *usual* or any large amount of sparks escaping at all.

That he would have been able to notice if there was something unusual in the action of the engine.

On cross-examination witness testified that he was familiar with the kind of coal used on these engines. That it was a lignite coal, very light, and lighter than that used on the Northern Pacific. That it was not necessarily on account of the coal used that the large nozzle was required on the companies' engines. That idea was that this coal did not require the draft that a heavier and harder coal would. It did not require the draft, could be worked with a smaller draft and small netting. That the coal was not fine, but was lump coal, but that it was soft coal or light coal.

That small meshes could be used with this soft coal—smaller than on coal where a heavier draft was required and that a large fire-box and heating surface

(Testimony of R. M. Wasson.)

could be used. He did not think the light coal threw out more sparks than the hard coal—at any rate not in these engines.

If this coal was burned in one of the N. P. engines which are equipped for harder coal and for a stronger draft it might possibly throw out more sparks. He had never seen it tried. That he knew that wood used in an engine would throw out more sparks than coal. That it was because it was a different material. That probably the harder the coal the less sparks would be thrown out; and the harder the substance used for combustion the fewer would be the sparks under the same conditions. [72]

That when asked on cross-examination if, in using a lignite coal, sparks would be thrown out of a smaller break in the netting than as though you used heavier coal, the witness answered: “Well, it would under the same conditions, probably. I never saw this demonstrated. I am just giving my idea.”

On redirect the witness testified that the size of the meshes in engine 527 was what was known as 7x7. Seven holes to the square inch, or so.

[Testimony of L. Frank Gordon, for Defendant.]

L. FRANK GORDON, called as a witness for defendant Oregon-Washington Railroad & Navigation Co., testified that he was claim agent for that company. That he had been looking after the trial of this case. That he did not know where Mr. Fred Zintz was and had been unable to find him.

That Zintz was present at the last trial and was one of the inspectors. That he had made inquiry to

(Testimony of L. Frank Gordon.)

ascertain his whereabouts and had gone to Portland for that purpose, and had not been able to find Zintz at all since the last trial. That Portland was where Zintz formerly lived and was employed.

[Testimony of J. A. Donovan, for Defendant Oregon-Washington Railroad & Navigation Company (Recalled).]

J. A. DONOVAN, recalled as a witness on behalf of Oregon-Washington Railroad & Navigation Co., testified that he knew Mr. Zintz, the boiler inspector. He was shown the entries in the book from which the witness had previously testified as to inspections made by him, and asked in whose name two entries on that page were that were not in his handwriting. He stated that the signatures to those two entries was that of Fred Zintz. That Zintz occupied the position of night inspector for the nettings, ash-pans and spark-arresters equipment.

That this handwriting resembled Mr. Zintz' signature. [73] That the entry shows that on the 12th day of July, 1911, the condition of the smokestack and netting were good and was signed Fred Zintz, Inspector. A juror asked on what engine, and the witness replied engine 527.

Then testifying to another entry witness then testified that on July 20, 1911, the entry showed condition of smokestack and netting good, of ash-pan and netting good, signed Fred Zintz, Inspector. That on July 31, 1911, entry showed engine 527, condition of smokestack and netting good, ash-pan and netting good, signed Fred Zintz, Inspector.

(Testimony of J. A. Donovan.)

Thereupon the defendant Oregon-Washington Railroad & Navigation Co. offered in evidence the testimony of Mr. Zintz, taken at the last trial of this case. That is a copy as transcribed by the stenographer.

The plaintiff objected on the ground that it was not admissible, incompetent, irrelevant and immaterial, but stated that they did not object on the ground of its being a transcript.

Plaintiff also further objected on the ground that it was not shown that the defendant could not get the deposition of the witness. The objection was overruled and an exception allowed plaintiff.

Whereupon the testimony of Mr. Zintz given at the former trial was read to the jury, which in substance is as follows: [74]

[Testimony of Fred Zintz, for Defendant Oregon-Washington Railroad & Navigation Company.]

(By Mr. SULLIVAN.)

Q. You were employed by the Oregon-Washington Railroad & Navigation Company during July, 1911? A. Yes, sir.

Q. In what capacity? A. Boiler-maker.

Q. What were your duties?

A. My duties were to inspect front ends of the engines and the ash-pans and netting.

Q. Did that include that apparatus to prevent the escape of cinders and so forth? A. Yes, sir.

Q. Do you remember whether you made an inspection of engine No. 527 during the month of July, 1911?

(Testimony of Fred Zintz.)

A. I could not remember, not unless I saw the book.

Q. Did you make an entry of it in a book you kept?

A. Yes, sir.

Q. I call your attention to entries on the 12th of July, 1911, and ask you in whose handwriting those entries are?

Mr. HODGE.—I object to that as incompetent; no identification of the book has been made.

Q. Is that the book you refer to as being kept?

A. Yes, sir, this is the book.

Q. Now, I renew my question.

A. This is my handwriting, on the 12th of July and on the 20th and on the 31st of July.

Q. Now, can you state what was the condition of that apparatus or meshing and spark-arresters and so forth on those dates? [75]

Mr. BEDFORD.—From your own memory?

Mr. SULLIVAN.—No, by refreshing your memory.

A. I found them in good condition.

Q. Does that include all three days, including the 31st of July? A. That includes all three of them.

Q. This engine 527, do you know whether or not it was a new or old engine at the time?

A. It was a new engine; well, not exactly new, but only a couple of months old; they only came in lately.

Q. What class was these engines called?

A. We called them the Mikado class.

Q. The 500 class? A. The 500 class.

Q. They all have the same class of spark-arresters,

(Testimony of Fred Zintz.)

meshings and so forth?

A. Yes, sir, that class all have the same netting and spark-arresters, ash-pan and so forth.

Q. What was the netting called, the general designation? A. We usually called it 7x7 mesh.

Cross-examination.

(By Mr. BEDFORD.)

Q. Without looking at this book, after you have seen it, now, can you remember of your own memory and knowledge as to the condition of any one of those engines you examined during the month of July?

A. Well, I could not state any particular engine of my own knowledge, because I have examined them right along and could not exactly say which engine it was, or which month, of my own memory. [76]

Q. Then so far as your memory goes, you have no memory of any particular engine or the inspection of it during the month of July?

A. No, not without the book.

Q. And even in looking at the book it don't bring to your memory anything regarding the engine, only from the fact that you put it down, and so must be so because you put it down?

A. Well, that is the only memory I have.

Mr. BEDFORD.—I move to strike the answers as to the engine being in good condition at that time.

The COURT.—Motion denied; it seems that it is a book kept in the course of business; exception allowed.

Q. Wherever you put the word "good" down here, that means what?

(Testimony of Fred Zintz.)

A. That means that the engine is inspected and found in first-class condition; that no repairs are needed.

Q. Then if all of the engines are marked good during that whole period, then that means that no engines were found out of repair during July?

A. That means they were found O. K.

Q. Isn't it a fact that all of the entries in this book are good?

A. Well, I could not tell. If there was any work done or repairs on the engine it is stated in that book.

Q. What do you mean by 7x7 mesh?

A. That it has seven squares to the inch of the wire, it is a wire netting; seven squares to each inch.

Q. That is you have seven wires running each way to the inch?

A. Yes, sir, seven holes to the inch. [77]

Q. What is this mesh; is it wires or sheet metal stamped? A. It is made of wire.

Q. How thick is the wire?

A. I would judge somewhere around not quite 1/16th.

Q. About 1/16th?

A. Somewhere around there; that wire goes by numbers.

Q. As near as you can get it it is about 1/16th?

A. Yes, sir.

Q. That would make each inch 7/16 solid wire scarred over the inch? A. Yes, sir.

Q. Then the balance would be equally divided in these seven spaces? A. Yes, sir.

(Testimony of Fred Zintz.)

Q. Consequently nothing larger than that, 1/16th, or 1/2 of the 1/16th could get through those meshes?

A. Well, as I recall, nothing larger than the end of a small match might get through.

Q. Then no sparks of any size, or lasting any distance could possibly get through that mesh if it is in proper condition?

A. Nothing can get through there to get up to any height, if it is in good condition.

Q. But if sparks larger than that went through to any height or distance, it would show that the mesh was not in good condition, wouldn't it?

A. Yes, sir.

Redirect Examination.

(By Mr. SULLIVAN.)

Q. I hand you this piece of netting, and ask you if that is the kind of netting which was used on these engines? [78]

A. Yes, sir, this is the kind of netting.

(Marked Identification No. 1.)

The COURT.—When with reference to the inspection of the engine is the record made?

A. So soon as the engine is inspected, maybe ten minutes; they are entered right away so that nothing is forgotten.

(Witness excused.) [79]

[Testimony of R. M. Wasson, for Defendant Oregon-Washington Railroad & Navigation Company (Recalled).]

R. M. WASSON was recalled for further examination and was asked how far sparks would go through

(Testimony of R. M. Wasson.)

a 7x7 netting if in good repair. To which the witness answered: "Well, that depends on the condition. On the condition of the fire, the condition of the speed of the train, the wind, etc. You would have to give me an example.

Then he was asked the following question: With your netting in good repair, will sparks shoot up through that netting high enough to be carried by a light wind 80 or 90 feet, falling upon combustible material and ignite that material. To which the witness answered: No, sir, not if the netting is in good condition.

On redirect the witness testified that the top of the smokestack of the engine from the level of the ground or the rails of the track was 16 feet 6 inches.

[Testimony of W. A. Perley, for Defendant Oregon-Washington Railroad & Navigation Company.]

W. A. PERLEY, witness for the defendant Oregon-Washington Railroad & Navigation Co., testified that he was a special representative of the mechanical department of the O.-W. R. & N. Co., and that he had been acting in that capacity for fifteen months. That for five years prior to that time he was State Railroad Inspector for the Public Service Commission of the State of Washington. That his duties in this capacity were to look after the equipment, track and practical operation of the railroads and investigate accidents.

Prior to the time when he was in the employ of the State he had been a locomotive engineer, master mechanic and traveling engineer. That ever since 1876

(Testimony of W. A. Perley.)

He had been connected with the mechanical departments of railroads with the exceptions of the five years he was with the State commission.

That he was familiar with engine 527 and this class [80] of engines. That this engine was turned over to the defendant company in May, 1911, and was put in service the latter part of May or the first part of June, 1911, just as soon as they could get them into condition.

He testified that these engines are modern freight engines designed by the Harriman people, and had an exceptionally large fire-box heating surface and large nozzle. They were up to date in every way. Had automatic ash-pans. That the ash-pan netting he had been talking about was on nearly all the modern engines. There is a space left between the moot ring and part of the ash-pan that is opened in order to admit air to the fire, and that it was covered by the netting when the engine was in motion, to keep the fire from falling out. The ash-pan was made concave, and while there was little liability of coal falling out in that place, they have it covered with netting to avoid the possibility.

That these engines were first-class engines, and that the type of fire-box and large number of flues and large boiler capacity enable these engines to be operated with a much larger nozzle than the older engines with less draft. That he thought they were just as safe as any engine in the State for fire.

Witness was here shown a model of the class of engine to which engine 527 belonged.

The witness then described in detail from the

(Testimony of W. A. Perley.)

model the operation and construction of the fire apparatus, etc., stating that the model represented the front end of the Mikado type of engine and the flues and fire-box, etc., and stated that all the cinders, smoke and everything came through the flues. [81] That the steam from the cylinders after it had performed its function was conducted into the atmosphere through a nozzle, that fills the stack, and in passing through with great velocity it takes out the air and forms a vacuum in the front end, that made the draft.

That the cinders, gas and smoke passing through the flues struck a deflecting plate and are deflected down against the back of the smoke-box. Then the cinders and smoke would go up against the 7x7 netting, and the successive exhaust pound them up and down and break them up until they are fine enough to go through the 7x7 netting. That netting is a netting with seven openings to the square inch.

Witness was here shown a piece of netting and stated that it was a 7x7 netting, stating that it being difficult to put in that size of netting in his model and the small wire netting was used in the model instead of that shown to him.

A juror asked the witness if this netting did not burn out pretty fast. The witness answered: Not in that type of engine. That with the large area of netting and large exhaust there was no trouble with any of this netting; that it lasted for months.

Whereupon the model referred to by witness was introduced in evidence as exhibit No. 2.

Witness testified that this netting would last for

(Testimony of W. A. Perley.)

months. That the defendant company's road operated through a very dry country in some instances, and in order to protect the interests of the company a very rigid smokestack and ash-pan netting inspection had been adopted all over the Harriman system. [82] That all engines were inspected every trip and a record was kept of their condition, because the company's engines operated through a wheat country in Eastern Washington, where the crops were growing right along the rails, and it was a standing rule of the company that these engines should be inspected every trip at the round-house.

Asked how it was as to its deflectors and capacity to stand the wear and tear, the witness stated that this engine 527 was as well equipped with spark-arresting device, as it was possible to equip an engine and operate a train. One could not cook his breakfast with the pipe stopped up and a train could not be operated without draft. When there was draft there would be sparks.

That these engines were designed for burning lighter coal than the Northern Pacific burned.

That one engine was designed, number 500, and the Harriman mechanical representative came out from New York and adopted it and other roads are adopting it. That the Great Northern has some new ones. Owing to the exceptionally large fire-box, which is larger than any locomotive built up to that time, the large number of flues gives such a great heating surface that they can run a much larger nozzle than the ordinary nozzle. That experience

(Testimony of W. A. Perley.)

has taught that the use of this type of engine was practical. Absolutely so. That they have given greater satisfaction.

That on other types of engine they use a 4x4 netting in the winter-time. In the opinion of witness, this engine 527 was equipped with the most modern and safest appliances it was possible to operate under. That he was familiar with the tests that were made when the 3x3 netting was adopted [83] in this State. The netting used by the Northern Pacific.

The witness stated that the standard size netting was 3x3. That the various mechanical representatives of the railroads met with the State Fire Warden at Olympia and fixed upon the 3x3 netting as standard, and this was in general use on the engines of the Northern Pacific, and that the Northern Pacific also used 4x4 netting and the Great Northern used that with a perforated plate that is between the 3x3 and 4x4.

That the engines of the Northern Pacific of the 2100-class were not as new a design as the 500-class of the O. & W., and that the 7x7 netting with the class of coal used by the Northern Pacific could not be used on the Northern Pacific engines. That fires would inevitably be started. That this had been the history of railroads ever since they operated engines.

On cross-examination witness was asked what kind of coal was it that netting was not needed with. That there was a coal used on the division south of

(Testimony of W. A. Perley.)

Spokane which comes from Alberta and in testing for sparks at night he had ridden on the hind end of a train and did not see a spark. That he really did not think it was necessary to use a netting. That the O.-W. Company used lignite coal between Seattle and Umatilla and through this section.

That he was not one of the commission that adopted the 3x3 netting—he was simply conversant with the fact.

The witness was asked on cross-examination the following question: With the 7x7 netting, a train passing the side of the mill building within 80 or 90 feet of the building, and a spark passing through that netting, if that netting was in perfect condition, could fire be thrown as far as that building, [84] and ignite combustible material?

To which witness answered as follows: Well, that would simply be a matter of opinion on my part. You can take the netting and look at the hole through there, and a very, very small spark, if the netting was in proper condition, it would have to be a very small spark to be emitted. In my opinion, it would not retain sufficient heat at that distance.

Witness also testified that in his opinion ninety feet outside the right of way, if a spark went that distance, it would not indicate that the spark-arrester had a hole in it of some kind to let the spark through.

He also testified that the smaller the nozzle the more intense the draft. That on account of the great volume of steam, the more it is contracted the

(Testimony of W. A. Perley.)

greater the velocity. It was a soft exhaust, just enough to move gases through the fire box.

That the 7x7 mesh was not made of as big wire as the 4x4 netting.

On redirect the witness testified that the distance a spark or any other object would be carried through the atmosphere would depend to a large extent upon the velocity of the wind—whether there was any wind. That when the engine was going straight ahead, with no wind, the sparks would go straight up in the air and the train running along they would fall back on the cars. [85]

[Testimony of William Fettig, for Plaintiff (in Rebuttal).]

WILLIAM FETTIG was called on behalf of the plaintiff in rebuttal, and testified that he had been engaged in the shingle business for the last ten years, except during the last few years he had not been active.

That his business called him in and about sawmills a good deal and he had had occasion to observe fires about mills started by sparks. That a spark might smolder in the dust and sawdust which would accumulate on the top of a mill building and away from a breeze, but a spark either went out or blazed up and ignited the building for a period of anywhere from minutes to hours, depending upon the kind of material gathered there and the kind of sawdust and the wind, etc.

That he had observed where a spark had gone in sawdust or dust accumulation after a length of time.

(Testimony of William Fettig.)

The witness was asked the following question: "Calling your attention to the mill building in the month of July, when it is dry, where dust and saw-dust has accumulated on the roof, the building being constructed as shown by Plaintiff's Identification "B," how long might a spark under those conditions lie at the place on the roof of that building marked with an X, when the wind was in the northeast and did not strike this spark?"

This was objected to as incompetent, irrelevant and immaterial and too general, and not based upon any facts in the case, by the respective attorneys for defendants.

The Court overruled the objection, each of the defendants excepted, and each of the exceptions were allowed.

The witness answered: "It might lie there for hours. [86]

On cross-examination witness testified that he was now in the real estate business and had been in this business for three or four years.

That it had been several years since he was engaged in the shingle business at Buckley. That he was in that business at Buckley on and off for fifteen years. That his mill never burned down at all. That he had operated one saw-mill and three shingle-mills at Buckley. That none of these had burned.

That he was connected in Tacoma with a gentleman named Busselle. That he had an office alongside of plaintiff in Tacoma.

That he had never had any experience with mills

(Testimony of William Fetting.)

being burned by sparks from engines.

That he did not know anything about nettings or spark-arresters or engines or what they might or might not do.

On redirect the witness testified that he had not in any manner been connected with plaintiff in business.

[Testimony of L. L. Doud, for Plaintiff (in Rebuttal).]

L. L. DOUD, witness called in rebuttal for plaintiff, testified that his business was lumber. Had been that since 1900. That in this business he had had occasion to observe the action of fire and sparks on sawdust and dust accumulated about the mill.

Witness was then asked, on direct, the following question: "I will ask you, where a mill is constructed as shown by Plaintiff's Identification 'B' and a spark should fall on the roof of a building where there is dust and sawdust accumulated, in the month of July, when it is dry, the spark being out of the way of the wind, how long that spark might remain there in this dust and sawdust before going out or igniting material [88] of the mill building?"

The witness answered as follows: "In my opinion it would depend, of course, entirely on the collection on the roof; it might be a few minutes and it might be a long time that it would remain there before it would go up."

Witness also stated that what he meant by a long time was several hours—half a day. That he would figure from the condition of the stuff that collected

(Testimony of L. L. Doud.)

on the roof. It might create a condition in a place where it would remain several hours; depending entirely on the stuff on the roof and the wind.

On cross-examination witness stated that he did not know anything about the condition of this building in 1911, or the roof. That he did not know what the suit was about until he came into the room.

That it would depend largely upon whether there was a wind or not as to how quickly it would ignite.

That he had never seen this building.

That it would also depend largely upon whether the mill was dry or not and how thick the dust was.

That in his experience around sawmills it would depend upon the collection on the roof. That there was always more or less stuff lying around mills, from the fires and stacks, and it creates different kinds of collections.

That if everything was exceedingly dry sawdust and dry shingles it would start very quick, depending a good deal on whether in the middle of the day or at night.

The Court then inquired as follows, regarding the witness Zintz: "Is there any objection to lack of notice?" Mr. Hodge, one of the attorneys for plaintiff, stated, "We will withdraw [87] our objection to the introduction of that testimony."

The Court answered, "Very well."

Mr. Bedford, one of plaintiff's attorneys, then read from the World's Almanac, showing that on Saturday July 15th, sun rose at 4:35 and twilight commenced at 2:14 A. M. [89]

**[Motion of Oregon-Washington R. R. & Nav. Co. for
a Directed Verdict (Grounds of Motion).]**

At the close of the evidence, and at the proper time, the defendant Oregon-Washington Railroad & Navigation Company moved the Court for a directed verdict in its favor upon the following grounds:

1.

That the evidence was insufficient to justify a verdict against it.

2.

That there was no sufficient testimony showing that this company was guilty of any negligence in the operation of its engines or that its engines were negligently constructed or equipped.

3.

That there was no sufficient evidence to show that any fire was started by reason of any sparks emitted by defendant's engine.

4.

That the plaintiff having sued upon a joint cause of action alleged against both defendants, and having proved, if it had proved anything, a separate act by each defendant, is not entitled to maintain this action.

This motion was denied by the Court, to which ruling the defendant Oregon-Washington Railroad & Navigation Company excepted and the exception was allowed.

The defendant Northern Pacific Railway Company also made an identical motion as the above, which motion the Court denied to which ruling

the defendant Northern Pacific Railway Company excepted and the exception was allowed. [90]

[Instructions Requested by Defendant Oregon-Washington R. R. & Nav. Co.]

At the proper time and before the cause was submitted to the jury, the defendant Oregon-Washington Railroad & Navigation Company requested, in writing, that the following instructions be given to the jury:

This action is brought by the plaintiff to recover damages to his property by reason of the same having been burned by a fire which plaintiff claims was communicated to the property by means of sparks from one or both of the engines of the respective defendant companies. Plaintiff alleges that each of the defendants was negligent, in that its locomotives were so carelessly and negligently constructed, and were so carelessly and negligently operated by their servants and agents that sparks were emitted therefrom, which sparks fell upon and about the building in which plaintiff's property was located and setting fire thereto. You will observe plaintiff claims that each defendant and both of them were negligent in two particulars:

First: In that the engines of the defendants were carelessly and negligently constructed.

Second: In that the engines were carelessly and negligently operated, so that sparks were caused to be emitted therefrom. [91]

2.

In order to recover against the defendant, The

Oregon-Washington Railroad & Navigation Company, the plaintiff must prove:

First: That the property was destroyed by fire.

Second: That this fire was set out and started by a spark or sparks from one of said companies' engines.

Third: That the engine was either defectively constructed so that it would emit sparks of such a character that the same could be provided against by the exercise of ordinary care and caution on the part of the company, or that the engine was so carelessly and negligently operated by the servants and agents of defendant company that it would emit sparks of such a character that it could have been provided against by the exercise of ordinary care and caution on the part of the defendant company.

3.

It is a matter of common knowledge that locomotive engines in which coal or wood are used as fuel will emit a certain amount of sparks, and that there has been no device adopted, by which all of the sparks generated in an engine will be arrested but that some of them will escape, although the engine is equipped with spark-arresters on an approved pattern, and the engine operated by servants who are personally skillful and careful.

4.

In order to find the defendant, The Oregon-Washington Railroad & Navigation Company, negligent in the particulars mentioned, it is necessary for you to find, not only that sparks escaped from its engines, but you must go further, and find that these

sparks which did escape were caused to escape by reason of the defective construction of the engine from which they escaped, or by reason of its negligent operation, and, unless you find such to be the fact from the evidence, it is [92] your duty to return a verdict for this defendant, even though you should be of the opinion that the fire was started by a spark or sparks thrown off from the passing engine of the defendant.

5.

It will not be necessary for you to consider the negligence of the defendant The Oregon-Washington Railroad & Navigation Company at all until you have first determined the manner in which the fire started, and that it was started by a spark or sparks thrown off by an engine of that company. If the fire started in any other way, or if the preponderance of proof does not convince you that it started from an engine of this company, then your verdict must be for the defendant, The Oregon-Washington Railroad & Navigation Company, and it is not necessary for you to consider any other question in the case, and you will return a verdict for the defendant, The Oregon-Washington Railroad & Navigation Company.

6.

You are not allowed to speculate how the fire originated, but it is for the plaintiff to show that the fire started from sparks emitted from an engine of the Oregon-Washington Railroad & Navigation Company, and if the plaintiff has failed to do so, then your verdict must be for the defendant, The Oregon-

Washington Railroad & Navigation Company. [93]

7.

You are also instructed that the defendant, The Oregon-Washington Railroad & Navigation Company, is not responsible for any act of the defendant The Northern Pacific Company, or of any of its officers, agents or employees in the operation of the engines of said company or otherwise.

8.

You are further instructed that if the evidence is balanced as to whether the fire was caused by sparks from an engine of the defendant, The Oregon-Washington Railroad & Navigation Company, or sparks from an engine of the defendant, The Northern Pacific Railway Company, if you find that the fire did originate from sparks from an engine at all—then your verdict must be for the defendant, The Oregon-Washington Railroad & Navigation Company, for in that case there would not be a preponderance of evidence that the defendant The Oregon-Washington Railroad & Navigation Company was guilty of any negligent act.

9.

You are further instructed that the defendant, The Oregon-Washington Railroad & Navigation Company, being engaged in the operation of a railroad, that it is its duty under the law to operate its trains upon the tracks, and that if the engines are equipped with spark arresters of an approved pattern, and the spark arresters were in good condition, and the engine was operated in an ordinarily skillful manner, then the defendant has performed its full duty under

the law and would not be liable to plaintiff even though sparks from its engines caused the fire which destroyed plaintiff's property. [94]

10.

A party is not entitled to recover merely because a fire has been started from sparks from an engine of a railroad company. There must be negligence alleged and proved either in the construction of the engine or in its operation.

11.

A railroad company is not an insurer of the safety of property along its line, and could not be held liable for the destruction of property by fire even though such fire is caused by sparks from its engines, unless the engine was improperly constructed or negligently operated, and this must be shown by a fair preponderance of the evidence.

12.

The mere fact that a building close to or adjacent to the right of way of a railroad company was burned raises no inference of itself that the fire was caused by an engine of the railroad company, and the fact, if it be a fact, that the engine of the railroad company emitted sparks, would not be sufficient to show that the fire was caused by sparks emitted from the engine of the railroad company.

13.

The burden of proof is upon the plaintiff throughout the entire case, and he must establish by a fair preponderance of the evidence all of the facts which he is required to show to entitle him to a verdict. [95]

14.

If you find for the plaintiff he would be entitled to recover the fair reasonable market value of his property at the time of its loss and no more. You cannot allow a speculative or imaginary value, or anything beyond the reasonable market value of the actual property destroyed, and you are to determine this from all the evidence and are not bound by the evidence of any witness in relation thereto.

15.

There was some evidence introduced by plaintiff as to fires originating in the vicinity by sparks from engines within thirty days prior to the date when plaintiff's property was burned. The Court instructs you that this evidence is too indefinite and uncertain to constitute any proof against the defendants, or either of them. You will, therefore, disregard this testimony in your consideration of the case.

16.

While the jury cannot find any negligence against either company because of a train of the Northern Pacific Railway Company going north about 3:35 A. M., still the fact that this train did pass this building at that time, or about that time, is a circumstance to be considered by the jury in considering whether or not some other agency than that of the Oregon-Washington Railroad & Navigation Company's freight train or the Northern Pacific Railway Company's passenger train caused the fire.

17.

The fact that this train did pass the premises going
[96] north at the time it did is permissible to be

considered by you as a circumstance tending to show that the fire might have been started by a train other than the freight train of the Oregon-Washington Railroad & Navigation Company or the passenger train of the Northern Pacific Railway Company.

18.

You are instructed that if you find that the fire was not discovered by the witnesses until about 3:30 A. M. then your verdict must be for the defendants.

19.

If you believe from the evidence that the fire which destroyed plaintiff's property did not begin until shortly before 3:30 A. M., July 15, 1911, then your verdict must be for the defendants. [97]

[Instructions Refused.]

The Court refused to give instruction No. 15 asked for by said defendant, which instruction reads as follows:

There was some evidence introduced by plaintiff as to fire originating in the vicinity by sparks from engines within thirty days prior to the date when plaintiff's property was burned. The Court instructs you that this evidence is too indefinite and uncertain to constitute any proof against the defendants, or either of them. You will, therefore, disregard this testimony in your consideration of the case.

To the refusal of the Court to give this instruction each of the defendants separately excepted and the exceptions were allowed by the Court.

The Court refused to give instruction No. 16 asked

for by said defendant, which instruction reads as follows:

While the jury cannot find any negligence against either company because of a train of the Northern Pacific Railway Company going north about 3:35 A. M., still the fact that this train did pass this building at that time, or about that time, is a circumstance to be considered by the jury in considering whether or not some other agency than that of the Oregon-Washington Railroad & Navigation Company's freight train or the Northern Pacific Railway Company's passenger train caused the fire.

To the refusal of the Court to give this instruction each of the defendants separately excepted and the exceptions were allowed by the Court.

The Court refused to give instruction No. 17 asked for by said defendant, which instruction reads as follows:

The fact that this train did pass the premises going north at the time it did is permissible to be considered by [98] you as a circumstance tending to show that the fire might have been started by a train other than the freight train of the Oregon-Washington Railroad & Navigation Company or the passenger train of the Northern Pacific Railway Company.

To the refusal of the Court to give this instruction each of the defendants separately excepted and the exceptions were allowed by the Court.

The Court refused to give instruction No. 18 asked for by said defendant, which instruction reads as follows:

You are instructed that if you find that the fire

was not discovered by the witnesses until about 3:30 A. M., then your verdict must be for the defendants.

To the refusal of the Court to give this instruction each of the defendants separately excepted and the exceptions were allowed by the Court.

The Court refused to give instruction No. 19 asked for by the said defendant, which instruction reads as follows:

If you believe from the evidence that the fire which destroyed plaintiff's property did not begin until shortly before 3:30 A. M. July 15, 1911, then your verdict must be for the defendants.

To the refusal of the Court to give this instruction each of the defendants separately excepted and the exceptions were allowed by the Court. [99]

Charge to the Jury.

The COURT.—Gentlemen of the Jury: The arguments of the case being concluded, the Court will instruct you concerning the law before you go out for consideration of your verdict.

You will take with you the pleadings in this case, which consist of the amended complaint filed by the plaintiff, and the answer of each of the defendants, and you are expected to examine them in order to determine what one side alleges and the other side admits or denies. Briefly, as you will gather by this time, the plaintiff complains of the defendants and charges that both of them were careless and negligent in the manner of the construction of their engines and the manner of operation over this line of road, and because of that his mill was burned down.

The defendants each deny this negligence, this

carelessness charged against them by the plaintiff. That makes this suit what is known as a suit on account of negligence. Negligence is known in the law and defined as the want of ordinary care. Ordinary care is defined as that care which would be exercised by an ordinarily careful and prudent person, having regard to the consequences reasonable to be apprehended from the want of proper prudence. The law is that every person, not only railroads but every person, must exercise ordinary care in the use of his property so that the property of others may not be injured. If a person fails to exercise ordinary care in the use of his property and that [100] failure to exercise ordinary care on his part is the proximate cause of injury to someone else, he is responsible. That is the general statement of the law of negligence. But before the plaintiff can recover in this case, he must have shown by a fair preponderance of the evidence that at least one of these defendants was negligent, and in at least one of the things of which he complains in his complaint, and that that negligence must also be shown before the plaintiff can recover, by a fair preponderance of the evidence, to have been the proximate cause of the burning of this mill. If the plaintiff does not show that one of these defendants was negligent in at least one of the particulars of which he complains, and that that negligence was the proximate cause of the burning of the mill, then he cannot recover and your verdict would be for the defendants.

It will first be your duty to determine in this case, and you will not go outside the evidence and you will

not speculate or guess concerning any of the issues in this case, but if the evidence has shown, it will be first your duty to determine whether or not the mill was burned from sparks emitted by one of these engines, that is, one of the engines of one of the defendant companies. If you find that there is a fair preponderance of evidence showing that it was set on fire and burned down by the sparks emitted from the engines of one of these companies, it will then be your duty to pass on and determine whether either of the defendants have been negligent in either of the particulars of which [101] complaint is made by the plaintiff. If you find that one or both of the defendants were negligent in one or both of the particulars of which complaint is made in the complaint, and that that is shown by a fair preponderance of the evidence, it will then be your duty to determine whether that negligence was the proximate cause of the setting fire to the mill, and last, it will be your duty to determine and announce by your verdict, which of the defendants, or both, if you do find both negligent you so find.

As I have indicated to you in these instructions, it would not be necessary in order to justify a recovery by the plaintiff that both of the defendants were negligent, and it would not be necessary to justify a recovery that one of the defendants should be negligent in both of the particulars of which complaint is made.

It is not sufficient for a railroad company to use ordinary care in the construction of its equipment, but after it has constructed it and made it ordinarily

safe, it must use ordinary care in the operation of it.

The Court in these instructions has used the expression, proximate cause, and preponderance of evidence. As near as the Court can explain to you proximate cause, is to tell you that every person, not only railroad companies, but every person is liable for all those consequences that flow naturally and directly from his acts, but that he is not liable for consequences that do not flow naturally and directly from his acts.

Concerning the preponderance of evidence, I have told you that before the plaintiff can recover, he must [102] have shown to you by the evidence in this case which has been admitted,—and you are not to guess or surmise about what any evidence would be that was not admitted, or anything that was ruled out,—he must have shown by a fair preponderance of the evidence admitted in Court that this negligence was the proximate cause of his injury, the negligence of which he complains. That is true of every negligence case. If a party charges another in court with negligence, he must establish it in any case by a fair preponderance of evidence before he can recover, and in this case if you find that the weight of the evidence on this question of negligence is with the defendants, or that it is evenly balanced so that you are unable to say on which side the preponderance is, then the plaintiff cannot recover and your verdict would be for the defendants. Preponderance of evidence is defined as being the greater weight of the evidence, and it cannot be stated in exact use of words that evidence weighs in a material

sense; all that the Court can tell you is that evidence preponderates which appeals to your reason and your experience and understanding so as to create and induce belief in your mind; and if there is a dispute in the evidence, that it still so appeals to your reason and belief as to create and induce belief in your minds.

As has been told you by counsel on both sides, it is not sufficient for the plaintiff to show you that his mill was fired from the sparks from one of the defendant's engines. There has no way been devised for using coal for the creation of the steam in locomotives in which [103] some sparks will not escape, and if these sparks cause a fire without negligence on the part of the company that is using the engines, they are not liable. Negligence must be established and that negligence shown to be the proximate cause of the injury.

I will give you certain written instructions, and you will understand if I cover the same ground I have already covered, it is not with any intent on the part of the Court to try to emphasize particular parts of these instructions or lead you to think that those are of more importance than those which are not in the written instructions.

This action is brought by the plaintiff to recover damages to his property by reason of having been burned by fire which plaintiff complains was communicated to the property by means of sparks from one or both of the engines of the respective defendant companies. Plaintiff alleges that each of the defendants was negligent, in that its locomotives were

so carelessly and negligently constructed and operated by their servants and agents that sparks were emitted therefrom and fell upon the building in which plaintiff's property was located, and setting fire thereto. You will observe that the plaintiff claims that each and both of the defendants were negligent in two particulars, first, in that the engines of the defendants were carelessly constructed, and second, that the engines were carelessly and negligently operated so that sparks were caused to be emitted therefrom.

A party is not entitled to recover merely because fire has been started from sparks from the engines of a [104] railroad company; it must be alleged and proved that it was negligence either in the construction of its engines or in the operation thereof.

A railroad company is not an insurer of the safety of the property along its line, and could not be held liable for the destruction of property by fire even though such fire is caused by sparks from its engines, unless the engine was improperly constructed or negligently operated, and this must be shown by a fair preponderance of the evidence.

The mere fact that a building close to or adjacent to the right of way of a railroad company was burned raises no inference of itself that the fire was caused by an engine of the railroad company, and the fact, if it be a fact, that the engine of the railroad company emitted sparks, would not be sufficient to show that the fire was caused by sparks emitted from the engine of the railroad company; but these circumstances, if established, might be considered by

you with all other circumstances and conditions proven in the case in determining what the cause of the fire was.

The burden of proof is upon the plaintiff throughout the entire case, and he must establish by a fair preponderance of the evidence all of the facts which he is required to show to entitle him to a verdict.

I will give you certain written instructions which as read apply to the O. & W. R. R. Company alone. In the course of the argument, it has been mentioned, and the Court instructed you early in the case, that if the Oregon-Washington Railroad & Navigation Company was negligent [105] in the particular of which the plaintiff complained, and that that negligence was the proximate cause of the fire, the Oregon & Washington Railroad & Navigation Company would not only be liable, but the Northern Pacific Railway Company would be liable as well, because the Northern Pacific is allowing them to use their tracks in a negligent manner, but if the fire was negligently caused as complained of, by one of the Northern Pacific engines, the Oregon & Washington Railroad & Navigation Company would not be liable, because the extent of its liability is confined to furnishing proper engines and properly equipped and operated in an ordinarily careful and skillful manner, and would not in any way be responsible for the conduct of the Northern Pacific Railway Company; so that you will understand these written instructions are applicable to the O. & W. R. & N. Company; but in so far as the case turns on the charge that the Northern Pacific Railway Company carelessly equipped

its engines and carelessly operated them, the same rule applies; but because of this further liability of the Northern Pacific Railway Company in not only being responsible for its own acts of carelessness, if any have been shown, but for those of the other company, it is necessary to separate the two and instruct you on that phase of the case.

In order to recover against the defendant The Oregon-Washington Railroad & Navigation Company, the plaintiff must prove: First, That the property was destroyed by fire. Second, That this fire was set [106] out and started by a spark or sparks from one of that company's engines. Third, That the engine was either defectively constructed so that it would emit sparks of such a character that the same could be provided against by the exercise of ordinary care and caution on the part of the company, or that the engine was so carelessly and negligently operated by the servant and agents of defendant company, that it would emit sparks of such a character that it could have been provided against by the exercise of ordinary care and caution on the part of the defendant company.

It is a matter of common knowledge that locomotive engines in which coal or wood are used as fuel, will emit a certain amount of sparks, and that there has been no device adopted, by which all of the sparks generated in an engine will be arrested, but that some of them will escape, although the engine is equipped with spark-arrester of an approved pattern, and the engine operated by servants who are reasonably skillful and careful.

In order to find the defendant, The Oregon-Washington Railroad & Navigation Company, negligent in the particulars mentioned, it is necessary for you to find that not only sparks escaped from its engine, but you must go further and find that these sparks which did escape were caused to escape by reason of the negligent construction of the engine from which they escaped (that is, what the Court told you, in effect; you [107] must find that negligence is the proximate cause), and unless you find such to be the fact from the evidence, it is your duty to return a verdict for this defendant, even though you should be of the opinion that the fire was started by a spark or sparks thrown off from the passing engine of the defendant.

It will not be necessary for you to consider the negligence of the defendant The Oregon-Washington Railroad & Navigation Company at all until you have first determined the manner in which the fire started, and that it was started by a spark or sparks thrown off by an engine of that company. If the fire started in any other way, or if there is not a preponderance of evidence showing that it started from an engine of this company, then your verdict must be for the defendant, The Oregon-Washington Railroad & Navigation Company, and it is not necessary for you to consider any other question in the case, and you will return a verdict for the defendant, The Oregon-Washington Railroad & Navigation Company.

You are not allowed to speculate how the fire originated, but it is for the plaintiff to show that the fire

started from sparks emitted from an engine of the Oregon-Washington Railroad & Navigation Company, and if the plaintiff has failed to do that, then your verdict must be for the defendant, The Oregon-Washington Railroad & Navigation Company.

You are also instructed that the defendant, The [108] Oregon-Washington Railroad & Navigation Company is not responsible for any act of the defendant, The Northern Pacific Railway Company, or of any of its officers, agents or employees in the operation of the engines of said company or otherwise.

You are further instructed that if the evidence is balanced as to whether the fire was caused by sparks from an engine of the defendant, The Oregon-Washington Railroad & Navigation Company, or sparks from an engine of the defendant, The Oregon-Washington Railway Company—if you find that the fire did originate from sparks from an engine at all—then your verdict must be for the defendant The Oregon-Washington Railroad & Navigation Company, for in that case there would not be a preponderance of evidence that the defendant The Oregon-Washington Railroad & Navigation Company was guilty of any negligent act.

You are further instructed that the defendant The Oregon-Washington Railroad & Navigation Company, being engaged in the operation of a railroad, that it is its duty under the law to operate its trains upon its tracks, and that if its engines are equipped with spark-arresters of an approved pattern, and the spark-arresters were in good condition, and the en-

engine was operated in any ordinary skillful manner, then the defendant has performed its full duty under the law and would not be liable to plaintiff, even though sparks from its engine caused the fire which destroyed plaintiff's property. [109]

If you find for the plaintiff he would be entitled to recover the fair reasonable market value of his property at the time of its loss and no more. You cannot allow a speculative or imaginary value, or anything beyond the reasonable market value of the actual property destroyed, and you are to determine this from all the evidence and are not bound by the evidence of any witness in relation thereto.

There is some evidence concerning a part of the property damages having some value after the fire. You will understand that the measure of damages is the difference between the fair market value of the property before the fire and the fair market value of the property after the fire; that is, it would be your duty to deduct, if you find under these instructions and evidence for the plaintiff, when you come to assess the amount of recovery, if you find that the property had a fair market value after the fire, it would be your duty to subtract from the fair market value you found from the evidence that it had at the time of the fire, its value after the fire. On this question of market value, all the Courts can tell you is that market value is what property brings in the open market. It has sometimes been said that market value of an article is what a man takes who is willing but not anxious to sell, when another man wants it and is willing but not anxious to buy—the

price at which they would arrive and the property would pass would be the fair market value. [110]

In this case there was some evidence admitted concerning other fires set within thirty days previous to the fire in question. You will understand that unless there is some evidence to show that those fires were set by engines of the Oregon-Washington R. & N. Company, you will not consider that evidence as in any way affecting that company, unless, as I say, there is evidence to show that those fires were set by the engines of that company or some of them.

You are in this case, as in every other case where questions of fact are submitted to you, the sole and exclusive judges of every question of fact in the case and the weight of the evidence and the credibility of the witnesses. In passing upon the credibility of witnesses, the law says you should consider the demeanor of each witness who has appeared and testified before you and the manner in which they gave their testimony, whether they impressed you as testifying fairly, openly, trying to tell you all they knew about what they were asked, trying to tell you the whole truth, neither more or less, or whether they impressed you as being reluctant and evasive, trying to hold back something from you, or, on the other hand, whether they impressed you as being too willing, too prompt in giving testimony about things which they were not asked,—in other words, swift witnesses. You should also take into consideration the probability and reasonableness of each witness' testimony by itself, whether it appears to be a probable, consistent story, whether

corroborated where you would expect it to be corroborated where true, [111] or whether contradicted by other evidence; also the situation of each witness as enabling that witness, if he wanted to tell the truth, as enabling him to do so.

You will also take into consideration the interest that each witness may have been shown to have in the case, either by the manner of his testimony or by his relation to the case and the circumstances out of which it grew. The plaintiff having taken the stand in his own behalf, you will apply to his testimony the same rule that you do to other witnesses, including his interest in the case.

The Court will submit to you three forms of verdict. One finding for the defendant generally; that has no blanks in it; one finding for the plaintiff against both defendants, and one finding for the plaintiff against the defendant Northern Pacific Railway Company. As I have explained to you about this difference between the liabilities of the two companies, I do not think it is necessary to read that; counsel have dwelt upon it; but each of these last two verdicts finding against both defendants, in the one against the Northern Pacific there is a blank left in which, if you find for the plaintiff against the defendant, it will be necessary to insert the amount at which you assess the verdict.

The Court also submits to you a special finding to be returned with your verdict. If you find for the plaintiff, you will insert your answer to this question as to what engine you find caused the fire by the emission of sparks.

Mr. QUICK.—There is one instruction which I wish [112] the Court to give in regard to the proposition of negligence, in failing to use the latest device or invention.

The COURT.—Gentlemen of the jury, I think one of the jurors asked about that, and in answering I think the law was stated by counsel quite clearly. The law does not require the latest equipment. A railroad company, nor anyone, is not obliged, if the machinery they have is reasonable and satisfactory and ordinarily safe to operate with ordinary care,—there is no duty devolving upon them to throw it away and try something simply because it is new. If it is reasonably adequate and satisfactory and in reasonably good repair and operated with ordinary care, that is the extent of the duty.

When you have arrived at your verdict, you will cause whichever of these forms agrees with your verdict to be signed by your foreman, and notify the bailiff that you have agreed. Be careful to answer the interrogatory which the Court submits.

(Jury retires and then is recalled.)

The COURT.—Gentlemen of the Jury, the Court has been reminded that while I was trying to read one of these instructions, I interpolated something and failed to read it all, and to avoid any chances of mistake on that ground I will read the whole instruction to you again.

In order to find the defendant Oregon-Washington Railroad & Navigation Company negligent in the particulars [113] mentioned, it is necessary for you to find not only that sparks came from its engine,

but you must go further and find that these sparks which did escape were caused to escape by reason of the defective construction of the engine from which they escaped, or by reason of its negligent operation, and, unless you find such to be the fact from the evidence, it is your duty to return a verdict for this defendant, even though you should be of the opinion that the fire was started by a spark or sparks thrown off from the passing engine of the defendant.

You may retire. [114]

[Exceptions to Instructions Given.]

The defendants, and each of them, made the following exceptions to the charge given by the Court to the jury, before the retiring of the jury:

The defendants, and each of them, separately excepted to the charge of the Court in submitting the question of fires being started by separate engines of the defendants to the jury, on the ground that *the was* was not in accordance with the pleadings and issues in the case. Which exceptions were allowed.

The defendants, and each of them, separately excepted to that part of the charge which reads as follows:

“It will be your first duty to determine whether or not the mill was burned from sparks emitted by one of these engines, that is one of the engines of one of the defendant companies.”

Which exceptions, and each and both of them, were allowed separately.

Said exceptions being upon the ground that the

pleadings and issues in this cause did not justify the submission of this matter to the jury.

The defendants, and each of them, separately excepted to all that part of the instruction of the Court which reads as follows:

“If you find there is a fair preponderance of the evidence showing that it was set on fire and burned by the sparks emitted from the engines of one of these companies.”

Upon the ground that the same could not be submitted under the pleadings and issues in the cause.

A separate exception was allowed to each defendant. [115]

At the close of the argument the Court submitted to the jury a special interrogatory, which is given below, and also a form of verdict, on April 25, 1913, the jury returned a verdict, of which the following is a copy, omitting the title:

We the jury in the above-entitled cause, find for the plaintiff and against the Northern Pacific Railway Company and the Oregon-Washington Railroad & Navigation Company, and assess plaintiff's damages at the sum of \$3,120.

\$3,120.00

S. A. GIBBS, Jr.,

Foreman.

At the same time they returned the special interrogatory submitted to the jury by the Court with the answer thereto, which interrogatory and answer is as follows, omitting the title:

Q. If your verdict is in favor of the plaintiff, state whether the fire was started by sparks from the engine drawing Northern Pacific passenger train

No. 301 or the engines of the Northern Pacific freight train 680 or the engine of the O. W. R. & N. freight train No. 691.

A. Fire was started by sparks from the engine of the O. W. R. & N. freight train No. 691.

S. A. GIBBS, Jr.,

Foreman. [116]

In due time, and within the time prescribed by the rules of the court, the defendant Oregon-Washington Railroad & Navigation Company duly filed a motion for a new trial, upon the following grounds:

[Motion for New Trial (Grounds Thereof).]

Comes now the defendant, Oregon-Washington Railroad & Navigation Co., and petitions the Court for a new trial in the above-entitled action, upon the following grounds:

1.

Insufficiency of the evidence to justify the verdict.

2.

Errors of law occurring at the trial.

3.

Newly discovered evidence material for the defendant, which could not with reasonable diligence have been discovered and produced at the trial.

Defendant assigns and claims that errors in law occurred upon the trial in the following particulars:

a. That the Court submitted to the jury the question of liability of this defendant for the tort set out in the pleadings, and the defendant introduced evidence tending to show two separate torts, one committed by this defendant and the other by its codefendant.

b. The Court erred in submitting to the jury the question of other fires; on the ground that the evidence of other fires was too indefinite and uncertain to justify the submission of that question to the jury; on the ground that there was no evidence of any negligence on the part of the defendant in setting other fires; on the ground that the testimony as to other fires related indiscriminately to this defendant and the engines of the defendant Northern Pacific Railway [117] Company and to fires of the engines of the Great Northern Railway Co., and on the ground that the evidence was not limited to fires started by the engines of this defendant; on the ground that the evidence was not limited to fires started by the engines of this defendant and by the engines of the defendant Northern Pacific Railway Company; on the ground that the testimony of previous fires was not limited so far as this defendant was concerned, to the particular engine which it was claimed caused the fire in this case; on the ground that the testimony as to previous fires simply relate to fires upon the right of way and to dry rubbish, and do not relate to or show any fires on the roof of this building or other buildings; on the ground that in this case proof of other fires was inadmissible as being immaterial and not competent evidence against this defendant.

c. The Court also erred in permitting various witnesses for plaintiff to testify as to previous fires being set out by the engines of this defendant and of the defendant Northern Pacific Railway Com-

pany, upon all of the grounds and objections made in subdivision b.

d. The Court erred in refusing to give at the close of the testimony this defendant's request for a written instruction to the jury to return a verdict for the defendant.

e. The Court erred in refusing to give instruction No. 10 requested by this defendant.

f. The Court erred in refusing to give instruction No. 15 requested by this defendant. And the Court erred in giving to the jury the modification which the Court did give of that instruction.

g. The Court erred in refusing to give instruction No. 17 requested by this defendant. [118]

h. The Court erred in refusing to give instruction No. 18 requested by this defendant.

i. The Court erred in refusing to give instruction No. 19 requested by this defendant.

j. The Court erred in submitting the said cause to the jury at all.

4.

There was no sufficient evidence to justify the jury in finding either.

a. That the locomotive of this defendant was improperly constructed or unskillfully or improperly operated or that there was any defect of any kind in the spark arresting apparatus; or that they emitted sparks or fire; or that they were not operated in a prudent, ordinary and skillful manner; or that there was any carelessness or want of care either in the construction of the locomotives or fire arresting devices or in its operation.

b. There was no sufficient evidence to justify the jury in finding that the fire alleged in the complaint, originated by reason of sparks emitted from any locomotive of this defendant.

c. The evidence did not disclose, by a preponderance or otherwise, whether the fire was caused or might have been caused, by the engine of defendant Northern Pacific Railway Company or sparks from the engines of this defendant. The evidence discloses, if it discloses that either engine may have started the fire, that either one might have started it and there is no preponderance of evidence that the fire started from sparks emitted from the engine of this defendant. [119]

d. That the evidence discloses by clear, convincing, uncontradicted and positive testimony that the engine and apparatus of this defendant was in perfect condition and that the engine was operated in a careful and non-negligent manner.

e. That there was no evidence to justify the jury in finding that this defendant was guilty of any wrong or tort towards plaintiff.

5.

This defendant also asks that the verdict be set aside and a new trial granted for the following reasons: That the witness Ebert, who testified for the plaintiff and who was the principal witness in regard to the respective engines of the two defendants throwing sparks upon the building and about it before the fire also testified in the case in which one Allen was plaintiff, which was tried immediately following this cause and in which the jury returned a

verdict for the defendant, testified in the Allen case that the train of defendant was throwing a cloud of big sparks out of the engine for three and a half blocks. His testimony in this case and the testimony of witnesses Lindsay and Guy show that all along this distance of three and a half blocks there was very dry grass and no fires were started in this dry grass from the sparks from either of these engines or at all. In this case Ebert had not testified to this cloud of sparks for three and a half blocks, and it is fair to assume that if he had that a showing that the grass on the right of way and about the same was exceedingly dry and there were no fires started in it would have caused the jury to have rendered a verdict for defendant. [120]

That it is evident from Ebert's testimony that he was simply trying to make a case out for the plaintiff and was not frank and honest.

That this defendant at no time was in any situation to know anything about what Ebert would testify to except as gathered from all his testimony at the different trials of the cause and when he testified to this cloud of sparks for three and a half blocks in the Allen case the defendant was able to show, without any particular preparation therefor, the condition of the grass on the line of the road, and even Ebert himself admitted this condition.

Furthermore, the variation of Ebert's testimony in the various trials of this cause in justice would require that a new trial be granted in this case, so that a fair and impartial jury may have all the different statements which Ebert has made under oath in the

various trials and particularly in this last trial of the Allen case, in which the jury returned a verdict for the defendant.

This defendant relies in this petition upon all the pleadings on file in the action, on the written instruction requested by the defendant; instruction given to the jury by the Court; upon the testimony of the witnesses as transcribed by the stenographer in attendance, and upon the records and notes in said cause.

6.

That the verdict was contrary to the evidence.

7.

That substantial justice requires that a new trial be granted.

The motion was denied by the Court, to which ruling the [121] defendant Oregon-Washington Railroad and Navigation Company excepted and the exception was allowed.

Service of the above exceptions admitted at Tacoma, Washington, this 19th day of July, 1913.

E. D. HODGE and
CHAS. BEDFORD,
Attorneys for Plaintiff.

[122]

[Order Settling Bill of Exceptions, etc.].

United States of America,
Western District of Washington.

On this 21st day of July, 1913, the above cause coming on to be heard upon the application of de-

endants to settle a bill of exceptions in said cause, the defendant Oregon-Washington Railroad & Navigation Co. appearing by its attorneys, Messrs. Bogle, Graves, Merritt & Bogle, and Sullivan & Christian, and the defendant Northern Pacific Railway Company appearing by its attorney J. W. Quick, and the plaintiff appearing by his attorneys, Mr. E. D. Hodge and Mr. Chas. Bedford, and it appearing to the Court that the bill of exceptions was duly served on the attorneys for plaintiff within the time provided by law and no amendments have been suggested thereto, and counsel for plaintiff have no amendments to propose, and all the parties consenting to the signing and settling of the same; and that the time for settling said bill of exceptions has not expired, the same having been extended from time to time by stipulation and order of the Court for the reason that more time has been required, and it further appearing to the Court that the bill of exceptions contains all the material facts occurring in the trial of said cause, together with the exceptions thereto, and all the material matters and things occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of the bill of exceptions, and the clerk of the Court is hereby ordered and instructed to properly mark and identify such exhibits and attach the same thereto, or in case it is inconvenient or not practicable to attach said exhibits, to properly identify them in the cause and to forward them unattached as part of the bill of exceptions. [123]

Thereupon, on motion of defendant Oregon-Wash-

ington Railroad & Navigation Company, it is hereby ordered that said proposed bill of exceptions be and is hereby settled as true bill of exceptions in said cause, and that the same is hereby certified accordingly by the undersigned Judge of this court who presided at the trial of said cause as a true, full and correct bill of exceptions, and the clerk is hereby ordered to file the same as a record in said cause, and to transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

EDWARD E. CUSHMAN,

Judge. [124]

Assignment of Errors.

And now come the Northern Pacific Railway Company, a corporation, and the Oregon-Washington Railroad & Navigation Co., a corporation, plaintiffs in error, and make and file this, their assignment of errors:

1.

The District Court erred in permitting the witness, John Horn, for plaintiff, to answer the following question propounded by plaintiff's attorneys to him:

“State whether or not you ever saw any other fires in this immediate neighborhood set by sparks of the engines of the defendants Northern Pacific Railway Co. or Oregon-Washington Railroad & Navigation Co. at any time just prior to or within thirty days prior to the burning of this mill”; and in not sustaining the objections of the defendant, the Oregon-Washington Railroad & Navigation Co. and the ob-

jections of the defendant the Northern Pacific Railway Company thereto;

A. Said question and the testimony sought to be elicited thereby was incompetent.

B. That it was irrelevant and immaterial;
[125]

C. The question was too general, and included both companies in the same question, although the admitted facts in the case showed that a particular engine of defendant Oregon-Washington Railroad & Navigation Co. had caused the fire and that a separate and different engine of the defendant Northern Pacific Railway Company had caused the fire; and that plaintiff should have been limited, if the testimony was admissible at all, to fires started by each separate engine of the separate defendants.

D. That proof of fires set by engines of the respective companies is not admissible under the state of facts existing in this case.

E. That it appeared from the facts or admitted facts in the cause that plaintiff was undertaking to recover on an independent action against the Oregon-Washington Railroad & Navigation Co. as caused by a particular engine belonging to that company; and the plaintiff was also undertaking to recover for the injuries caused by the fire as being set by another and different engine belonging to the defendant Northern Pacific Railway Company, and that plaintiff was undertaking to show an independent act of negligence on the part of the Oregon-Washington Railroad & Navigation Co. for which the defendant Northern Pacific Railway Company was

in no way responsible.

The answer of the witness to the question above was: "Yes, sir."

2.

Witness having answered "yes, sir" to the above question, the following question was asked the same witness by plaintiff's attorneys:

"State the circumstances under which that fire occurred." [126]

The Court erred in not sustaining the objections of the respective defendants, and each of them, to this question, for the same reasons given and assigned to the preceding question in assignment of error No. 1.

The answer of the witness to this question was as follows:

He had seen several. That there was one set about thirty yards from the mill, and it was running pretty close to the fence where a private family was living, and he went over there and helped to put it out and also helped to put one out in the mill-yard, close to the mill four or five days before, the other probably happened a couple of weeks before.

He also testified on cross-examination that he did not remember the dates when he saw the fires preceding the day of the burning of the mill,—it might have been two weeks before. That he did not know what company the freight engine belonged to. He thought it was an Oregon-Washington. He did not know whether it was a Northern Pacific, or it might have been a Great Northern.

3.

The Court erred in permitting the witness Anna D.

McCarthy to answer the following question propounded by plaintiff's attorneys:

"Now, state to the jury whether or not you ever saw any other fires set by the Oregon-Washington and Northern Pacific Railway engines in this immediate vicinity and within about thirty days prior to the happening of this fire." And in not sustaining the objections of the respective defendants thereto for the same reasons given above in assignments of error number 1 and 2. [127]

To the above question the witness answered: "Yes, every few days I would see fires but they did not amount to much, because it was either put out by the engine-men themselves, or section-men, or the neighbors used their hose and put them out along where I lived."

4.

The Court erred in permitting the witness J. D. Banker to answer the following question propounded by plaintiff's attorneys, to wit:

"State whether or not at any time prior to the 15th day of July, 1911, and within thirty days prior thereto, you ever saw any fires set along the tracks and in this vicinity by sparks emitted from the engines of the Northern Pacific or Oregon-Washington Railroads," and in not sustaining the objections of the respective defendants to the question for the same reasons given in assignments of error 1, 2 and 3.

The witness, before this question was answered, was interrupted by plaintiff's attorneys and asked the question: State the occurrence," and in not sustaining the objections of each of the respective de-

fendants thereto, for the same reasons given in assignments of error 1, 2 and 3.

The witness answered the question: "State the occurrence," as follows: "I saw several grass fires."

Then the witness was immediately asked the following question: "Did you ever see any sparks emitted from the engines of these companies about that time?" And answered: "Yes, sir; on one particular instance I was at the mill to see Mr. Horn and a train went by and scattered considerable fire while we were on the platform; quite a lot. That at [128] this time he and Mr. Horn were on the far side of the mill from the track; on the east side of the mill. That sparks came over the mill and settled down all around them.

And in not sustaining the objection of the respective defendants to said question after the same had been amended by plaintiff's attorney by stating that he would limit the question to thirty days prior to the fire, for the same reasons given in assignments of error 1, 2 and 3.

Afterward, on cross-examination, the same witness testified relating to this matter that he supposed it was fifteen or twenty days that this occurrence happened before the fire that burned the mill. He also stated that he did not know what company's train it was, whether the Northern Pacific, the Great Northern or Oregon-Washington or what—could not say.

5.

The Court erred in permitting the witness Savage to answer the following question propounded by plaintiff's attorneys: "State whether or not at any

time, say within thirty days, prior to July 15, 1911, at or near the vicinity of this mill, you ever saw any fires by sparks from the engines of the Northern Pacific or Oregon-Washington Railroads, and in not sustaining the objections of the respective defendants, for the same reasons given in assignment, of errors 1, 2, 3 and 4.

6.

The Court erred in not granting the motion of the defendant Oregon-Washington Railroad & Navigation Co. for a directed verdict. [129]

a. For the reason that the evidence was insufficient to justify a verdict against it.

b. That the testimony did not show that said defendant company was guilty of any negligence or that its engines were negligently constructed or equipped.

c. That there was no evidence tending to show that any fire was started by reason of any sparks emitted by said defendant's engine.

d. That the plaintiff having sued upon a joint cause of action alleged against both defendants and having proved, if he had proved anything, a separate act by defendant was not entitled to maintain the action.

e. The Court erred in refusing to grant the motion of the defendant Northern Pacific Railway Company for a directed verdict in its favor for the same reasons given in subdivisions a, b, c, and d of this assignment of error No. 6.

7.

The Court erred in refusing to give instruction No.

15 asked for by the defendant Oregon-Washington Railroad & Navigation Co., which reads as follows:

“There was some evidence introduced by plaintiff as to fires originating in the vicinity by sparks from engines within thirty days prior to the date when plaintiff’s property was burned. The Court instructs you that this evidence is too indefinite and uncertain to constitute any proof against the defendants, or either of them. You will, therefore, disregard this testimony in your consideration of the case.
[130]

a. For the reason that said instruction was in accordance with the law and under the facts of the case, and for the reason that the evidence was too indefinite and uncertain to constitute any proof against the defendants or either of them.

b. Also for the reason that the answers of the various witnesses for plaintiff who testified as to seeing fires within thirty days prior to the date of the fire upon which plaintiff’s cause of action was based did not disclose the engine or engines of which respective defendant caused the previous fires, and also because the testimony of all such witnesses disclosed that another railroad, namely, the Great Northern Railway Co. operated its trains over this same track, and the witnesses did not know whether these fires about which they testified were started by this latter company or by one of the other companies.

8.

The Court erred in refusing to give instruction No. 16 asked for by defendant Oregon-Washington

Railroad & Navigation Co., which instruction reads as follows:

“While the jury cannot find any negligence against either company because of a train of the Northern Pacific Railway Company going north about 3:35 A. M., still the fact that this train did pass this building at that time, or about that time, is a circumstance to be considered by the jury in considering whether or not some other agency than that of the Oregon-Washington Railroad & Navigation Company’s freight train or the Northern Pacific Railway Company’s passenger train caused the fire.”

[131]

This was a circumstance that the jury should have been informed that it could consider in accordance with the requested instruction.

9.

The Court erred in refusing to give instruction No. 17 asked for by the defendant, the Oregon-Washington Railroad & Navigation Co., which instruction is as follows:

“The fact that this train did pass the premises going north at the time it did is permissible to be considered by you as a circumstance tending to show that the fire might have been started by a train other than the freight train of the Oregon-Washington Railroad & Navigation Company or the passenger train of the Northern Pacific Railway Company.” For the same reasons given in assignment of error No. 8.

10.

The Court erred in refusing to give instruction No.

18 asked for by defendant Oregon-Washington Railroad & Navigation Co., which instruction is as follows:

“You are instructed that if you find that the fire was not discovered by the witnesses until about 3:30 A. M., then your verdict must be for the defendants,” for the reason that said instruction was in accordance with the facts and law, and also for the reason that the length of time elapsing between the times when the respective engines passed the property that burned was so great under the circumstances that the fire was not discovered until 3:30 A. M., it was conclusive that the fire did not start from the engines of either of the companies.

11.

The Court erred in refusing to give instruction No. 19 [132] asked for by the defendant Oregon-Washington Railroad & Navigation Co., which instruction was as follows:

“If you believe from the evidence that the fire which destroyed plaintiff’s property did not begin until shortly before 3:30 A. M., July 15, 1911, then your verdict must be for the defendants,” for the same reasons as those set forth in assignment of error No. 10.

12.

The Court erred in submitting to the jury the question of fires being started by separate engines of the defendants, for the reason that it was not in accordance with the pleadings and issues in the case and that an action could not be maintained against the defendants jointly for individual torts.

13.

The Court erred in giving the jury the following instruction: "It will be your first duty to determine whether or not the mill was burned by sparks emitted by one of these engines, that is, one of the engines of defendant companies"; for the reason that the pleadings and issues in the case did not justify the submission of this to the jury, and that the plaintiff could not recover upon an independent tort committed by one of the defendants.

14.

The Court erred in instructing the jury as follows: "If you find that there is a fair preponderance of the evidence showing that it was set on fire and burned by sparks emitted from the engines of one of these companies," for the same reasons given in assignment of error No. 13. [133]

15.

The Court erred in overruling the motion of the defendant Oregon-Washington Railroad & Navigation Co. for a new trial, for the reasons given and set forth in the motion for a new trial, and for the reason of the manifest errors committed by the Court during the progress of the trial and for the reason that defendants did not have a fair and impartial trial.

16.

The Court erred in rendering and entering any

judgment against the defendants herein or either of them.

J. W. QUICK,

Attorney for Plaintiff in Error, Northern Pacific
Railway Company.

BOGLE, MERRITT, GRAVES & BOGLE,
SULLIVAN & CHRISTIAN,

Attorneys for Plaintiff in Error, Oregon-Washington
Railroad & Navigation Co.

[Endorsed]: "Filed U. S. District Court, Western
District of Washington. Jul. 26, 1913. Frank L.
Crosby, Clerk. F. M. Harshberger, Deputy." [134]

Prayer for Reversal.

Now come the Northern Pacific Railway Company, a corporation, and the Oregon-Washington Railroad & Navigation Company, a corporation, the plaintiff *is* error, and pray for a reversal of the judgment of the District Court for the Western District of Washington, Southern Division, in the action brought by said Cyrus A. Mentzer, plaintiff, and the defendant in error, against said Northern Pacific Railway Company, a corporation, and the Oregon-Washington Railroad & Navigation Co., a corporation, defendants, and plaintiffs in error herein, which judgment was entered in the office of the Clerk of said court on the 17th day of June, 1913, and was for the recovery of thirty-one hundred and twenty dollars, to-

gether with the costs and disbursements of action.

J. W. QUICK,

Attorney for Plaintiff in Error, Northern Pacific
Railroad & Navigation Company, 1507 National
Realty Bldg., Tacoma, Washington. [135]

BOGLE, GRAVES, MERRITT & BOGLE,
SULLIVAN & CHRISTIAN,

Attorneys for Plaintiff in Error, Oregon-Washington
Railroad & Navigation Company, 1507 National
Realty Bldg., Tacoma, Washington. [135]

Order Allowing Appeal.

Whereas, judgment was rendered in this court, on the 17th day of June, 1913, in an action wherein said Cyrus A. Mentzer was plaintiff, and said Northern Pacific Railway Company and Oregon-Washington Railroad & Navigation Co. were defendants, in favor of the plaintiff and against each of said defendants; and

Whereas, the said defendants, plaintiffs in error, as above named, have duly signed and filed a petition for a writ of error in said cause that the same may be appealed to the United States Circuit Court of Appeals for the Ninth Circuit; and

Whereas, said plaintiffs in error, defendants in said cause, have filed an assignment of errors, for use on appeal; and

Whereas, it is claimed that this Court committed various errors in the progress of said trial and in refusing to grant a new trial in said cause, and the Court being satisfied that it is a proper case in which an appeal should be allowed, it is hereby

ORDERED, that the appeal, by writ of error, be and the same is hereby allowed by this Court, and the Clerk is directed to issue a writ of error in accordance with the usual rules and practice of the Court.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Jul. 26, 1913. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy." [136]

Cost Bond.

KNOW ALL MEN BY THESE PRESENTS: That the Northern Pacific Railway Company, a corporation, and the Oregon-Washington Railroad & Navigation Co., a corporation, and National Surety Company, a corporation, are held and firmly bound unto the above-named Cyrus A. Mentzer in the sum of One Thousand Dollars, to be paid said Cyrus A. Mentzer; for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 26th day of July, 1913.

Whereas, the above-named Northern Pacific Railway Company, a corporation, and the Oregon-Washington Railroad & Navigation Co., a corporation, have prosecuted a writ of error to reverse the judgment of said District Court, rendered on the 17th day of June, 1913, in favor of said Cyrus A. Mentzer and against said Northern Pacific Railway Company, a corporation, and Oregon-Washington Railroad &

Navigation Co., a corporation, for the recovery of Three Thousand One Hundred and Twenty Dollars.

Now, therefore, the condition of this obligation is such that if the above named Northern Pacific Railway Company, a corporation, and the Oregon-Washington Railroad & Navigation Co., a corporation, shall prosecute said writ of error to effect and answer all damages and costs if they fail to make said appeal good this obligation shall be void; otherwise same shall remain in full force and virtue.

NORTHERN PACIFIC RAILWAY

COMPANY.

[Seal]

By J. W. QUICK,

Its Attorney. [137]

OREGON-WASHINGTON RAIL-

ROAD & NAVIGATION CO.

[Seal]

By BOGLE, GRAVES, MERRITT &

BOGLE,

SULLIVAN & CHRISTIAN,

Its Attorney.

NATIONAL SURETY COMPANY,

By H. P. OPIE,

Atty. in Fact. [Seal of Surety Co.]

The above bond is hereby approved as a cost bond this 26th day of July, 1913.

EDWARD E. CUSHMAN,

District Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Jul. 26, 1913. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy." [138]

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS: That the Northern Pacific Railway Company, a corporation, and the Oregon-Washington Railroad & Navigation Co., a corporation, and National Surety Company, a corporation, are held and firmly bound unto the above-named Cyrus A. Mentzer, in the sum of Four Thousand Dollars to be paid said Cyrus A. Mentzer; for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 26th day of July, 1913.

WHEREAS, the above-named Northern Pacific Railway Company, a corporation, and the Oregon-Washington Railroad & Navigation Co., a corporation, have prosecuted a writ of error to reverse the judgment of said District Court, rendered on the 17th day of June, 1913, in favor of said Cyrus A. Mentzer, and against said Northern Pacific Railway Company, a corporation, and Oregon-Washington Railroad & Navigation Co., a corporation, for the recovery of Three Thousand One Hundred and Twenty Dollars.

NOW, THEREFORE, the condition of this obligation is such that if the above-named Northern Pacific Railway Company, a corporation, and the Oregon-Washington Railroad & Navigation Co., a corporation, shall prosecute said writ of error to effect and answer all damages and costs if they fail to make

said appeal good this obligation shall be void, otherwise same shall remain in full force and virtue.

**NORTHERN PACIFIC RAILWAY
COMPANY.**

[Seal]

By J. W. QUICK,
Its Attorney. [139]

**OREGON-WASHINGTON RAILROAD
& NAVIGATION CO.**

[Seal]

By BOGLE, GRAVES, MERRITT &
BOGLE,
SULLIVAN & CHRISTIAN,

Its Attorney.

NATIONAL SURETY COMPANY,

[Seal of Surety Co.]

By H. B. OPIE,
Atty. in Fact.

The above bond is hereby approved as a supersedeas bond this 26th day of July, 1913.

EDWARD E. CUSHMAN,
District Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Jul. 26, 1913. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy." [140]

**[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.]**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing and at-

tached papers are a true and correct copy of the record and proceedings in the case of Cyrus A. Mentzer vs. Northern Pacific Ry. Co., and Oregon-Washington Railroad & Navigation Co., No. 1876C, as required by the praecipe of counsel filed in said cause, as the originals thereof appear on file in said court, at the city of Tacoma, in said District.

I do further certify that I hereto attach and herewith transmit the original Citation and original Writ of Error, original Prayer for Reversal, and original exhibits.

And I do further certify that the cost of preparing and certifying the foregoing record to be the sum of \$68.70, which sum has been paid to me by the attorneys for the plaintiffs in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at the city of Tacoma, in said District, this fifth day of August, A. D. 1913.

[Seal]

FRANK L. CROSBY,

Clerk.

By E. C. Ellington,
Deputy Clerk. [141]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. —.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation, and OREGON-WASHINGTON
RAILROAD & NAVIGATION CO., a Cor-
poration,

Plaintiffs in Error,

vs.

CYRUS A. MENTZER,

Defendant in Error.

Writ of Error [Original].

United States of America,—ss.

The President of the United States of America to the
District Court of the United States for the
Western District of Washington, Southern Divi-
sion, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment before you between
said Cyrus A. Mentzer, plaintiff, and the Northern
Pacific Railway Company, a corporation, and the
Oregon-Washington Railroad & Navigation Co., a
corporation, defendants, a manifest error hath hap-
pened to the great damage of the said Northern
Pacific Railway Company and the great damage of
the said Oregon-Washington Railroad & Navigation
Co., we being willing that such error, if any hath hap-
pened, should be duly corrected and full and speedy
justice done to the defendants aforesaid, in this be-
half do command you, if judgment be therein given,
that then, under your seal, distinctly and openly,

you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the court rooms of said court in the City of San Francisco, State of California, [142] together with this writ, so that you have the same at said place, before the Justices aforesaid, on or before the 24th day of August, 1913; that the record and proceedings aforesaid being inspected, the said Justices of the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 26th day of July, in the year of our Lord one thousand nine hundred and thirteen, and of the independence of the United States the one hundred and thirty-eighth.

[Seal]

FRANK L. CROSBY,
Clerk of the Circuit Court of Appeals for the United
States of America, for the Ninth Circuit.

By E. C. Ellington,
Deputy Clerk.

The foregoing writ is hereby allowed this 26th day of July, 1913.

EDWARD E. CUSHMAN,
Judge. [143]

[Endorsed]: No. —. U. S. Circuit Court of Appeals, Ninth Circuit. Northern Pacific Railway Company, a Corporation et al., Plaintiffs in Error, vs. Cyrus A. Mentzer, Defendant in Error. Writ of

Error. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jul. 26, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy.

[Endorsed]: No. 2298. United States Circuit Court of Appeals for the Ninth Circuit, Northern Pacific Railway Company, a Corporation, and Oregon-Washington Railroad & Navigation Company, a Corporation, Plaintiffs in Error, vs. Cyrus A. Mentzer, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Received August 8, 1913.

F. D. MONCKTON,
Clerk.

Filed August 8, 1913.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. —.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation, and OREGON-WASHING-
TON RAILROAD & NAVIGATION CO., a
Corporation,

Plaintiffs in Error,

vs.

CYRUS A. MENTZER,

Defendant in Error.

Citation [on Writ of Error (Original).]

United States of America,—ss.

To Cyrus A. Mentzer, Defendant in Error Above
Named, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the United States District Court for the Western District of Washington, Southern Division, wherein the Northern Pacific Railway Company, a corporation, and the Oregon-Washington Railroad & Navigation Co., a corporation, are plaintiffs in error, and you are defendant in error, and show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable EDWARD D. WHITE,
Chief Justice of the United States, the 26th day of
July, in the year of our Lord One Thousand Nine
Hundred and Thirteen.

[Seal]

EDWARD E. CUSHMAN,
District Judge.

Service of *with* within citation is hereby acknowl-
edged, by receipt of copy, this 26th day of July, 1913.

E. D. HODGE, and
CHAS. BEDFORD,

Attorneys for Defendant in Error.

[Endorsed]: No. —. U. S. Circuit Court of Ap-
peals for Ninth Circuit. Northern Pacific Railway
Company et al., Plaintiffs in Error, vs. Cyrus A.
Mentzer, Defendant in Error. Citation. Filed in
the U. S. District Court, Western Dist. of Washing-
ton, Southern Division. Jul. 26, 1913. Frank L.
Crosby, Clerk. By E. C. Ellington, Deputy.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. —.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation, and OREGON-WASHING-
TON RAILROAD & NAVIGATION CO., a
Corporation,

Plaintiffs in Error,

vs.

CYRUS A. MENTZER,

Defendant in Error.

Prayer for Reversal.

Now come the Northern Pacific Railway Company, a corporation, and the Oregon-Washington Railroad & Navigation Co., a corporation, the plaintiff in error, and pray for a reversal of the judgment of the District Court for the Western District of Washington, Southern Division, in the action brought by said Cyrus A. Mentzer, plaintiff, and the defendant in error, against said Northern Pacific Railway Company, a corporation, and the Oregon-Washington Railroad & Navigation Co., a corporation, defendants, and plaintiffs in error herein, which judgment was entered in the office of the Clerk of said court on the 17th day of June, 1913, and was for the recovery of Thirty-one Hundred and Twenty Dollars, together with the costs and disbursements of action.

J. W. QUICK,

Attorney for Plaintiff in Error, Northern Pacific
Railway Company.

Headquarters Building, Tacoma, Wash-
ton.

**BOGLE, GRAVES, MERRITT & BOGLE,
SULLIVAN & CHRISTIAN,**

Attorneys for Plaintiff in Error, Oregon-Washing-
ton Railroad & Navigation.

1507 National Realty Bldg., Tacoma, Wash-
ton.

[Endorsed]: No. 2298. U. S. Circuit Court of Appeals, Ninth Circuit. Northern Pacific Railway Company, a Corporation et al., Plaintiffs in Error, vs. Cyrus A. Mentzer, Defendant in Error. Prayer for Reversal. Received Aug. 8, 1913. F. D. Monckton, Clerk. Filed Aug. 8, 1913. F. D. Monckton, Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, and OREGON-WASHINGTON
RAILROAD & NAVIGATION COMPANY, a
corporation,

Plaintiffs in Error,

No. 2298

vs.

CYRUS A. MENTZER,

Defendant in Error.

Upon Writ of Error to the United States District Court
of the Western District of Washington
Southern Division

Brief of Appellant

J. W. QUICK,
N. P. Headquarters Bldg.,
Tacoma, Wash..

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT,
LAWRENCE BOGLE,
Central Bldg., Seattle, Wash.

P. C. SULLIVAN,
WALTER CHRISTIAN,
1507 National Realty Bldg.,
Tacoma, Wash.
Attorneys for Plaintiffs in Error.

In the
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, and OREGON-WASHINGTON
RAILROAD & NAVIGATION COMPANY, a
corporation,

Plaintiffs in Error,

vs.

CYRUS A. MENTZER,

Defendant in Error.

No. 2298

Upon Writ of Error to the United States District Court
of the Western District of Washington
Southern Division

Brief for Appellant

STATEMENT OF THE CASE.

Action brought by plaintiff to recover \$3,330, alleged value of planing mill and the machinery and lumber located near South Tacoma, Washington, and adjacent to the right of way of the Northern Pacific Railway Company, on allegations of negligence to effect as follows:

That on the 15th day of July, 1911, while the trains of the defendants were running upon the railway of the Northern Pacific Company and passing the property of plaintiff, one of the loco-

motives of the defendants was so carelessly and negligently constructed, and so carelessly and negligently operated that sparks were emitted therefrom, which, falling upon and about the building in which the greater portion of the property of plaintiff was located, set fire to said building and property, which fire spread upon and over the property of plaintiff and consumed the same.

That the injury to plaintiff was by reason of the negligent construction of the engines of the defendants and the carelessness and negligence of the servants and agents of the defendants in operating the same and in starting the fire and permitting it to burn the property (printed transcript, pp. 4-5).

It was also alleged that the two defendants were both operating trains over the same track; which track belonged to the Northern Pacific Railway Company (printed transcript, p. 4).

The defendants filed separate answers (printed transcript, pp. 5-7). Both defendants denied having caused the fire and each denied that it was guilty of any negligence whatever either in the construction of the locomotives or in their operation.

Upon trial a verdict was rendered against both

defendants in the sum of \$3,120 (printed transcript, p. 8).

At the same time the general verdict was rendered the jury made a special finding upon a special interrogatory submitted by the court, as follows:

“Q. If your verdict is in favor of plaintiff state whether the fire was started by sparks from the engine drawing Northern Pacific passenger train 301, or the engines of Northern Pacific freight train 680, or the engine of the O.-W. R. & N. freight train 691.”

“A. Fire was started by sparks from engine of the O.-W. R. & N. freight train 691.”

(Printed transcript, p. 8.)

Motion for a new trial was filed by the O.-W. R. & N. Co., which motion was, after argument, overruled by the court (printed transcript, pp. 122-127).

Final judgment was entered on the 16th day of June, 1913 (printed transcript, p. 9).

Bill of exceptions was duly settled on the 21st day of July, 1913 (printed transcript, pp. 129 to 139, and the bill of exceptions as a whole is from p. 10 to p. 129, printed transcript).

At the beginning of the trial it was stipulated that the block sheets of the two defendants should be considered in evidence showing the running time

of the trains on the 15th day of July, 1911. That train 691, O.-W. R. & N. Co., was a freight train, and that train 301, N. P. R. Co., was a passenger train, and train 680, N. P., was a freight train and was a double-header, propelled by two engines. That trains 691, O.-W. freight train, and 301 N. P. passenger train, were leaving South Tacoma for Portland, going south, and train 680 N. P. was coming from Portland, running north.

It was also stipulated that the O.-W. R. & N. Co. was running its trains over the trackage of the N. P. R. Co. between Tacoma and Portland under lease with the latter road—a trackage agreement, the property being owned by the N. P. R. Co. (printed transcript, p. 11).

The testimony of all of plaintiff's witnesses who testified as to seeing any of the trains passing South Tacoma identified the train of the O.-W. R. & N. Co. as the one referred to in the stipulation, and the train of the N. P. R. Co. as the passenger train referred to in the stipulation, leaving South Tacoma for Portland, and all of plaintiff's testimony was directed to showing that one or both of the engines of these trains emitted the sparks plaintiff claimed caused the fire. No testimony was introduced by plaintiff as to the N. P. freight train

moving from Portland to Tacoma, running north.

The number of the engine of the O.-W. R. & N. Co. was 527.

The number of the engine on N. P. passenger train was 2107.

During the taking of testimony witness for plaintiff, John Horn, was permitted against the objections of each of the defendants to testify that he had seen other fires in this immediate neighborhood started by sparks of the engines of the defendants at or within thirty days prior to the burning of the mill, and was permitted against the objections of each of the defendants to state the circumstances of such fire (printed transcript, pp. 15-18).

The court also permitted other witnesses to testify against the objection of the defendants, on behalf of plaintiff as to other fires within thirty days prior to July 15, 1911.

Testimony of Anna D. McCarthy (printed transcript, pp. 24-25).

Testimony of J. D. Banker (printed transcript, pp. 28-32).

Testimony of H. S. Savage (printed transcript, pp. 32-34).

All this class of testimony was objected to by the defendants by specific objections which will be given hereafter. Defendants also raised objections to this testimony by asking the court to instruct the jury to disregard this testimony in the consideration of the case (printed transcript, p. 135).

The block sheet referred to in the stipulation discloses that O.-W. R. & N. Co.'s train 691 passed South Tacoma station at 1:43 A. M., and the N. P. passenger 301 passed South Tacoma at 1:57 A. M. There was no dispute as to the hour when the trains passed South Tacoma depot. The property burned was situated down one-third of a mile south from the depot.

Plaintiff introduced testimony of various witnesses, which will be referred to hereafter, in support of the allegations of his complaint, and the defendants, and each of them, introduced testimony to disprove the allegations of plaintiff's complaint, and showed affirmatively by uncontradicted testimony that there was not any negligence in the operation of the trains or of the engines, spark arresters, fire apparatus, etc., nor was there any negligence in construction, and that the engine of each of the companies and its spark arrester, fire apparatus, etc., were in perfect repair and condition and that

their respective engines were all modern, up-to-date engines with the most perfect spark arresters, fire apparatus, etc., in existence, for the prevention of escaping sparks. This was particularly so of the defendant O.-W. R. & N. Co.—the defendant whose engine the jury found caused the fire.

The plaintiff did not introduce any evidence either in chief or rebuttal to disprove these facts.

At the close of the testimony the defendant O.-W. R. & N. Co. moved the court to direct a verdict in its favor upon the grounds that the evidence was insufficient to justify a verdict against it; that there was not sufficient testimony showing that the company was guilty of any negligence in the operation of its engines or that its engines were negligently constructed or equipped; that there was no sufficient evidence to show that any fire was started by reason of any sparks emitted by its engine; that the plaintiff having sued upon a joint cause of action alleged against both defendants and having proved, if he had proved anything, a separate act of each defendant was not entitled to maintain the action (printed transcript, pp. 97-134).

The N. P. Ry. Co. made an identical motion upon its behalf.

Each of these motions were overruled by the

court and each defendant excepted separately and the exceptions were allowed (printed transcript, p. 97).

The defendant O.-W. R. & N. Co. at the proper time asked for certain written instructions (printed transcript, pp. 98-104). The court refused to give instructions 15, 16, 17, 18 and 19 asked for by said defendant. These instructions asked for and refused were as follows:

15.

“There was some evidence introduced by plaintiff as to fires originating in the vicinity by sparks from engines within thirty days prior to the date when plaintiff’s property was burned. The court instructs you that this evidence is too indefinite and uncertain to constitute any proof against the defendants or either of them. You will, therefore, disregard this testimony in your consideration of the case.”

16.

“While the jury can not find any negligence against either company because of a train of the Northern Pacific Railway Company going north about 3:35 A. M., still the fact that this train did pass this building at that time, or about that time, is a circumstance to be considered by the jury in considering whether or not some other agency than that of the Oregon-Washington Railroad & Navigation Company’s freight train or the Northern Pacific Railway Company’s passenger train caused the fire.”

17.

"The fact that this train did pass the premises going north at the time it did is permissible to be considered by you as a circumstance tending to show that the fire might have been started by a train other than the freight train of the Oregon-Washington Railroad & Navigation Company or the passenger train of the Northern Pacific Railway Company."

18.

"You are instructed that if you find that the fire was not discovered by the witnesses until about 3:30 A. M. then your verdict must be for the defendants."

19.

"If you believe from the evidence that the fire which destroyed plaintiff's property did not begin until shortly before 3:30 A. M. July 15, 1911, then your verdict must be for the defendants."

To the refusal of the court to give these instructions each of the defendants separately excepted and the exceptions were allowed (printed transcript, pp. 104-106).

Among others the court gave the following instructions:

"It will be your first duty to determine whether or not the mill was burned from sparks emitted by one of these engines, that is, one of the engines of one of the defendant companies."

To the giving of which each of the defendants

separately excepted and the exceptions were allowed.

The court also gave the following instruction:

“If you find that there is a fair preponderance of the evidence showing that it was set on fire and burned down by the sparks emitted from the engines of one of these companies.”

The defendants also made separate objections to the charge of the court in submitting the question of fires being started by separate engines of the defendants to the jury on the ground that such instructions were not in accordance with the pleadings and issues in the case. These exceptions were allowed.

Exceptions to the other instructions above excepted to were also for this reason. Otherwise the defendants took no exceptions to the charge of the court, as actually given (printed transcript, pp. 120-121).

Defendant O.-W. R. & N. Co. filed a petition for new trial on the ground of the insufficiency of the evidence to justify the verdict; errors of law occurring at the trial; newly discovered evidence; and that the verdict was contrary to the evidence; said defendant assigning as errors of law all of the matters and things occurring in the progress of the trial to which exceptions were taken by the defendants, as hereinbefore set forth.

Defendant also asked that a new trial be granted because the principal witness for plaintiff, one Ebert, had in a subsequent case involving the same state of facts testified differently to material matters than he had at the trial of this cause (printed transcript, pp. 122-127). This motion was overruled and defendant O.-W. R. & N. Co. excepted and the exceptions were allowed.

Assignment of Errors; printed transcript, pp. 129-129; Writ of Error duly issued; printed transcript, pp. 146-147; Citation issued and served; printed transcript, p. 149.

SPECIFICATION OF ERRORS.

ONE.

The court erred in permitting the witness, John Horn, for plaintiff, to answer the following question propounded by plaintiff's attorneys, notwithstanding the objections of the separate defendants:

"State whether or not you ever saw any other fires in this immediate neighborhood set by sparks of the engines of the defendants Northern Pacific Railway Company or Oregon-Washington Railroad & Navigation Co. at any time just prior or within thirty days prior to the burning of this mill" (printed transcript, pp. 15-16).

The witness's answer to this question was, "Yes, sir."

The court erred in permitting the same witness to answer the following question asked him by plaintiff's attorneys immediately following the preceding question and answer, notwithstanding the objections of each defendant:

"State the circumstances under which that fire occurred."

The answer of the witness was as follows:

"I have seen several. There was one set about thirty yards from the mill and it was running pretty close to the fence where a private family was living, and I went over there and helped put it out, and also put one out right in the mill yard, close to the mill, probably four or five days before. This other happened probably a couple of weeks before" (printed transcript, pp. 17-18).

On cross-examination witness Horn testified that he was one of the firm of Horn Brothers, who owned and operated a shingle mill in the building, and that he had a suit against these same companies to collect for the loss of the shingle mill, but that this suit had been terminated.

That he did not remember the dates when he saw the fires, preceding the day of the burning of the mill, that it might have been two weeks before.

That one of the fires the railroad men and he

went over and put out. That fire was started from a freight engine. That the sparks were going out of this freight engine and the grass was pretty dry. That he did not know what company the freight engine belonged to, but that he thought it was an Oregon-Washington. That he did not know for certain whether it was or not.

That he did not know whether it was a Northern Pacific train. And when asked if it could have been a Great Northern train he said he did not know. That he knew that the Great Northern operated its trains over the same track.

He was then asked if he had seen sparks come out of the engines of all of these three different roads. He answered that he did not remember; that he did not pay attention.

That there was a grade at or near the mill to the south and that when a train started up it would sometimes puff pretty hard. That this was when he saw sparks coming out of some smokestacks. That the grass was very dry where the sparks alighted and they started fires. That this was about two weeks before the burning of the mill. That the next fire he saw prior to the burning of the mill property was close to the mill property, in the yard.

That this was two or three days before the mill was destroyed. That he saw this fire when it was probably a yard square. That he did not know that he saw this fire started by an engine. That he saw the engine pass, hauling a freight train. That he did not remember what company it belonged to. That he did not know as he looked. That he did not know whether the Northern Pacific, Great Northern or Oregon-Washington Railroad & Navigation Company were operating this train or engine (printed transcript, pp. 18-19).

TWO.

The court erred in permitting Anna D. McCarthy to answer, over objections of each of the defendants, the following question propounded by plaintiff's attorneys:

"Now state to the jury whether or not you ever saw any other fires set by the Oregon-Washington, and the Northern Pacific Railway engines in this immediate vicinity and within about thirty days prior to the happening of this fire."

The answer to this question was as follows:

"Yes, every few days I would see fires but they did not amount to much because it was either put out by enginemen themselves or section men, or the neighbors would use their hose and put them out along where I lived" (printed transcript, pp. 24-25).

THREE.

The court erred in permitting the witness J. D. Banker to answer over objections by each of the defendants, the following question, propounded by plaintiff's attorneys:

"State whether or not at any time prior to the 15th of July, 1911, and within thirty days prior thereto, you ever saw any fires set along the tracks in this vicinity by sparks emitted from the engines of the Northern Pacific or Oregon-Washington Railroads" (printed transcript, p. 28).

The witness answered:

"I saw several grass fires started."

FOUR.

Then witness was asked the following question:

"Did you ever see any sparks emitted from the engines of these companies about that time?"

"Witness answered, yes, sir. On one particular instance I was at the mill to see Mr. Horn and a train went by and scattered considerable fire while we were on the platform; quite a lot. That at this time he and Mr. Horn were on the far side of the mill from the track; on the east side of the mill. That sparks came over the mill and settled down all around them" (printed transcript, pp. 30-31).

The court erred in permitting the last above question and answer. Before the giving of the

answer, however, the plaintiff's attorney amended the question by stating that he would limit it to thirty days prior to the fire.

On cross-examination the witness testified that he supposed it was fifteen or twenty days that this occurrence happened before the fire that burned the mill. That the fire was started from the engine of a pretty heavy freight train. That the engine was working hard with it; that it had to get up lots of smoke. That it was somewhat upgrade going south. The engine would be required to work pretty hard if it stopped at the station and then started up the grade with a heavy train.

He also stated that he did not know what company's train it was; whether the Northern Pacific, the Great Northern or Oregon-Washington or what —could not say which. That the sparks at that time did not start any fire (printed transcript, p. 31).

FIVE.

The court erred in permitting the witness Savage to answer, over objection by each of the defendants, the following question propounded by plaintiff's attorneys:

“State whether or not at any time, say within

thirty days, prior to July 15, 1911, at or near the vicinity of this mill, you ever saw any fires set by sparks from the engines of the Northern Pacific or Oregon-Washington Railroads."

The witness answered: "Yes, sir. That he helped put some out" (printed transcript, pp. 32-33).

On cross-examination the witness was asked if he had observed any fires set by engines of the Great Northern Company. He answered as follows:

"I would not say what engines they were, but I saw several fires started from engines. That he did not know whether it was the engines of the Northern Pacific, the Oregon-Washington or Great Northern. That he would not say which it was. That it was very dry time and everything was highly inflammable" (printed transcript, pp. 33-34).

SIX.

The court erred in not granting the motion of the defendant O.-W. R. & N. Co. for a directed verdict (printed transcript 97).

SEVEN.

The court erred in not granting the motion of the defendant N. P. Ry. Co. for a directed verdict (printed transcript, p. 97).

EIGHT.

The court erred in refusing to give instruction 15 asked for by defendant O.-W. R. & N. Co., which instruction reads as follows:

“There was some evidence introduced by plaintiff as to fires originating in the vicinity by sparks from engines within thirty days prior to the date when plaintiff’s property was burned. The court instructs you that this evidence is too indefinite and uncertain to constitute any proof against the defendants, or either of them. You will, therefore, disregard this testimony in your consideration of the case” (printed transcript, p. 103).

NINE.

The court erred in refusing to give instruction 16 asked for by the defendant O.-W. R. & N. Co., which instruction reads as follows:

“While the jury cannot find any negligence against either company because of a train of the Northern Pacific Railway Company going north about 3:35 A. M., still the fact that this train did pass this building at that time, or about that time, is a circumstance to be considered by the jury in considering whether or not some other agency than that of the Oregon-Washington Railroad & Navigation Company’s freight train or the Northern Pacific Railway Company’s passenger train caused the fire” (printed transcript, p. 103).

fore it took fire. The particular engines were not identified, but their crossing raised at least some probability, in the absence of proof of any other known cause, that they caused the fire; and it seems to us, that under the circumstances, this probability was strengthened by the fact, that some engines of the same defendant, at other times during the same season, had scattered fire during their passage."

In the case at bar the specific engine of the O.-W. R. & N. Co. was identified, as was, also, the engine of the N. P. Ry. Co.

Again, even if this testimony was admissible as to other fires caused by the engines of the defendant O.-W. R. & N. Co. and of other fires caused by the engines of the N. P. Ry. Co. the questions and answers would be required to be limited to fires caused by the engines of each one of these companies separately. The testimony in the case at bar was simply that the engines of the O.-W. R. & N. Co. and the engine of the N. P. Ry. Co. set other fires within thirty days prior to the destruction of plaintiff's property. The testimony did not show that the O.-W. R. & N. Co.'s engines set fires or that the N. P. Ry. Co.'s engines set fires. but that one or the other did, and in all instances this list of engines that might have set fires included the engines of the Great Northern Railway Co. Surely it was no evidence against the

O.-W. R. & N. Co. that the N. P. or the Great Northern engines may have set fires, nor was it any evidence against the N. P. Ry. Co. that the Oregon-Washington or Great Northern companies' engines may have set fires.

THREE.

INSTRUCTION AS TO OTHER FIRES, REFUSED.

Upon this question of other fires, because of its intimate connection with the matter discussed in point two, we will here present error No. 8 in specification of errors. This is an instruction asked for by the defendant O.-W. R. & N. Co. and refused by the court (printed transcript 103-104).

By this requested instruction the court was asked to withdraw from the jury the testimony as to fires originating in the vicinity by sparks from engines within thirty days prior to the date when plaintiff's property was burned.

This instruction, we believe, should have been given for the reasons and upon the authorities stated in point two, above.

It should also have been given for the reason that upon cross examination the various witnesses testifying as to previous fires clearly disclosed that

they did not know to what company the engines belonged, that set the previous fires (testimony of John Horn, printed transcript, pp. 18-19; testimony of Anna D. McCarthey, printed transcript, p. 27; testimony of J. D. Banker, printed transcript, p. 31; testimony of H. S. Savage, printed transcript, p. 33).

All of these witnesses, except Anna D. McCarthey, testified that they did not know whether the previous fires were started by the defendant N. P. Ry. Co. or O.-W. R. & N. Co., or the Great Northern Ry. Co.

So far as Mrs. McCarthey's testimony is concerned, she only testified generally that she had seen fires every few days, but they did not amount to much because it was either put out by the engine-men or the section men or the neighbors (printed transcript, p. 25).

On cross-examination she reiterated this testimony (printed transcript, p. 27). She did not undertake to testify that these fires were caused by the engines of any particular company.

In view of the fact that it was admitted that the Great Northern Railway Co. operated its trains over this same track, if all other objections to the testi-

mony and to the refusal of the court to give the instruction referred to, it would seem clear that under no circumstance should testimony go to the jury as to fires that may have been set by the Great Northern Railway Co.

Also the defendant O.-W. R. & N. Co. should not be compelled to pay damages upon testimony that shows that these previous fires may have been fires started from engines of the N. P. Ry. Co.

As this matter went to the jury, under the testimony and instructions of the court, the jury had the liberty to find negligence upon the part of the defendant O.-W. R. & N. Co. because the engines of the defendant N. P. Ry. Co. or the engines of the Great Northern had previously within thirty days prior to the burning of the property set various fires in the vicinity.

FOUR.

INSUFFICIENCY OF THE EVIDENCE.

The court should have granted the motion of the defendant O.-W. R. & N. Co. for a directed verdict.

A. For the reason that the evidence was insufficient to justify a verdict against it.

B. That the testimony did not show that said defendant company was guilty of any negligence or that its engines were negligently constructed or equipped.

C. That there was no evidence to show that any fires were started by reason of any sparks emitted by said defendants' engines.

D. Plaintiff having sued upon a joint cause of action, alleged against both defendants, and having proved, if he had proved anything, a separate act of each defendant, was not entitled to maintain the action (printed transcript, p. 97).

The admitted facts showed that the O.-W. freight train departed from South Tacoma at 1:43 A. M. and the N. P. passenger train departed from South Tacoma at 1:57 A. M. (see schedule, Exhibit A). Thus the N. P. train was fourteen minutes later passing the burned premises than the O.-W. freight.

Train 680 was an N. P. double-header freight train, going from Portland to Tacoma and passed Lake View, a station just beyond South Tacoma, at 3:25 A. M. and arrived at South Tacoma station at 3:35 A. M. (see plaintiff's exhibit A, schedule of trains; Gillman's testimony, printed transcript, p.

44; Portrude's testimony, printed transcript, pp. 71-72).

The testimony as to the engines of the aforesaid trains of the O.-W. R. & N. Co. and the N. P. Ry. Co. throwing sparks previous to fire was in effect, as follows:

Wm. Ebert, for plaintiff, testified that he saw trains pass the mill the night of the fire, going toward Portland, one was a freight and one was a passenger. Both of them threw up sparks. There were quite a few sparks the size of a dime. These were going in the direction of the mill. That ten or fifteen minutes after the freight train passed the passenger train passed. That the passenger train was throwing up sparks and the freight train was apparently pulling pretty hard. That it was about fifteen or twenty minutes after these trains went by that he first saw the fire at the mill. That he did not turn in any fire alarm (printed transcript, pp. 34-35).

On cross-examination he testified that he was ninety to one hundred feet east and south of the mill, a street running between the mill and the house where he was. That he went to bed that evening about nine o'clock and waked up a number of times during the night. That he happened to see

the freight train because he had to get up and go to the closet and heard the train coming and looked out the window. The train was down towards the depot, three and a half to four blocks from the mill. That he watched it probably two minutes till the train came up to the end of the mill; saw it throwing sparks all the way along, about the size of a dime. He thought a dime was about the size of the top of the finger or finger nail. That the sparks looked about the size of a dime when the engine was three or four blocks away and that he could tell that they were larger than the end of a lead pencil. That they were larger than that. That he did not pay much attention to whether the sparks were the size of a dime or not but they looked to be. He was sure they were bigger than a lead pencil. That he could not tell the number of sparks that were larger than a lead pencil, but there were quite a few; lots of sparks coming out of the engine and the engine was working hard. That he was not particularly interested in the number of sparks it was throwing out or in the size of the sparks. That then he went down to the toilet in the house—downstairs. The passenger train did not go by until he came back upstairs. He went back to the bedroom before he saw the passenger train. That the passenger was about a

block and a half or two blocks from the mill when he first saw it. That the engine was throwing a few sparks. That they did not appear to be as big as the sparks from the freight (O.-W. R. & N. train), and there was not as many as from the freight. These sparks were not as large as a five cent piece. Some of them were as big as the end of a lead pencil. He did not pay any particular attention to this. That after the passenger train (N. P.) went by he went back down to the toilet and then came back up and after that laid down and presumed he went to sleep. He judged he was asleep or in a drowse fifteen or twenty minutes. He fixed the time because he thought of going down to the toilet again, but never looked at any timepiece. That he got up—then was when he first saw the fire. That he called the other boys and they got up and came to the window and looked out (printed transcript, pp. 35-37).

This was all the testimony there was on behalf of plaintiff as to the engines of either of the defendant companies throwing sparks.

This, in our opinion, was not sufficient evidence to go to the jury for the purpose of showing that the engine of the defendant company, O.-W. R. & N. Co., was not in repair or that it was negligently

operated or constructed.

Again, this testimony affirmatively shows that there was another agency that might have caused the fire, namely, the engine of the defendant N. P. Ry. Co., which passed the place fourteen minutes later than the O.-W. R. & N. Co.'s train. This N. P. engine was also throwing sparks. Testimony as to this was by the same witness who testified to the engine of the O.-W. R. & N. Co.'s train throwing sparks.

The undisputed testimony on behalf of plaintiff, as well as of some of defendant's witnesses, disclosed that the mill building in which plaintiff's property was situated was an open building—that is, was constructed, a very large portion of it, so there were no walls on the side, and any one could enter the building at any time, and there was opportunity for the fire to have been started by an incendiary or by carelessness. The building was situated along the line of the main thoroughfare of an extensively used railroad.

The only other evidence for plaintiff related equally to the indiscriminate starting of previous fires from the engines of the O.-W. R. & N. Co., the N. P. Ry. Co. and the Great Northern Ry. Co. without showing that the engines of any one of the com-

panies started the fire. This testimony has already been fully referred to. And even if this testimony was admissible, and the lower court was justified in refusing to give the instruction asked for by defendant O.-W. R. & N. Co. to disregard this testimony, it would not be sufficient to make a case for the defendant in error as against appellant O.-W. R. & N. Co. This evidence did not actually disclose that the defendant O.-W. R. & N. Co. set any of these previous fires, or if it did, it only disclosed that the N. P. Ry. Co. engines were guilty of the same thing and plaintiff would still have had just as perfect a cause of action made out against the N. P. Ry. Co., whose engine passed later than the O.-W. R. & N. engine. In other words plaintiff, under these circumstances, would have completely proved that it was just as reasonable to infer that the N. P. train was the cause of the fire as it was to infer that the O.-W. R. & N. train was the cause of the fire.

The N. P. Ry. Co. offered testimony to show that its fire apparatus, spark arresters, etc. were in perfect order, good condition and properly constructed. Likewise the O.-W. R. & N. Co. proved conclusively that its engine, spark arrester, fire apparatus, etc., were properly constructed and of the

best known type and class, and that it was not out of repair in any particular. This was proved by the inspectors, who had all quit the employ of the company, on account of a strike before this action was begun (testimony of J. A. Donovan, printed transcript, pp. 56-57; testimony of J. A. Driscoll, printed transcript, pp. 72-76; testimony of Fred Zintz, printed transcript, pp. 82-86).

It was also shown by the defendant O.-W. R. & N. Co. that its locomotive was properly operated (testimony of R. W. Wasson, printed transcript, pp. 77-80).

As to the modern character and efficiency of the engine, see also testimony of W. A. Perley (printed transcript, pp. 87-93).

N. P. Ry. Co. also introduce like conclusive proof, but as the jury found the fire was set by the O.-W. R. & N. Co. and the judgment is had against the N. P. Ry. Co. only because it was the owner of the track; it is unnecessary to refer in detail to this testimony.

There was no testimony in rebuttal as to the condition of the engines, their apparatus or of their operation. This testimony standing absolutely uncontradicted was conclusive evidence that the O.-W. R. & N. Co. was not negligent in the operation,

maintenance or construction of its engine or in its fire apparatus, spark arrester, etc., connected therewith.

The setting of a fire by a passing locomotive raises no legal presumption that it was the result of negligence.

Even though there might be some evidence of negligence, positive and uncontradicted testimony that the spark arrester was the most approved in general use and was in good condition and repair is conclusive.

Lake Erie & W. R. Co. vs. Gossart, 42 N. E. 818 (Ind.).

The court at page 819 says:

“The mere setting of a fire by a passing locomotive raises no legal presumption that it was the result of negligence. * * * The burden is cast upon the party seeking to recover damages for any injury therefrom to prove more than the mere escaping of fire to show actionable negligence on the part of the railroad company.”

Again, at page 820, the court says:

“Counsel for appellee insists that because a witness testified that sparks large enough to be carried sixty-eight feet, the distance from the appellant’s railroad to the point where the fire started, and remain alive so as to set fire to dry grass, weeds, etc., could not escape from appellant’s engine, except the spark arrester was out of repair,

from this evidence the jury had a right to infer that the spark arrester was out of repair, although there was positive evidence, uncontradicted, that the spark arrester on this engine was in good condition and repair. Counsel forget that there is no proof that the fire originated from appellant's engine, except the fact that the witness testified that a few minutes before the engine which it is claimed set the fire passed over appellant's road, he passed the place where the fire started and saw no fire; that after he had proceeded on his way a quarter of a mile the train overtook him and at that point he noticed sparks escaping. Under the adjudications in this state, above cited, this evidence alone is insufficient to prove negligence on the part of the appellant. On the other hand the evidence shows clearly that the spark arrester was the most approved in general use and was in good condition and repair. It is true that it is the province of juries to draw inferences of fact from the evidence, but they have no right arbitrarily to infer facts which there is no evidence to support."

Clark vs. Grand Trunk Western Ry. Co., 112 N. W. 1121 (Mich.).

Minneapolis Sash & Door Co. vs. Great Northern Ry. Co., 86 N. W. 451 (Minn.).

Shipman vs. Chicago, B. & Q. Ry. Co., 110 N. W. 535 (Neb.).

Smith vs. Northern Pacific Ry. Co., 53 N. W. 173-174-5 (N. D.).

Bernard vs. Richmond F. & P. R. Co., 8 S. E. 785 (Va.).

White vs. New York Central & H. R. R. Co., 85 N. Y. Sup. 497; affirmed 74 N. E. 1126.

Garrett vs. Southern Ry. Co., 101 Fed. 102.

Woodward et al. vs. Chicago, M. & St. P. Ry. Co., 145 Fed. 577.

Svea Ins. Co. vs. Vicksburg S. & P. Co., 153 Fed. 774-780-1.

Canadian Northern Ry. Co. vs. Senske, 201 Fed. 637 (C. C. A. 8 Circuit).

Thorgrimson vs. N. P. Ry. Co., 64 Wash. 500.

It should be borne in mind that it was not claimed by defendant in error that the fire was started by reason of sparks from engines igniting combustible material on the right of way, so no question of negligence is in this case because of the permitting of the accumulation of inflammable materials on the right of way.

In addition, however, to the situation as above given the defendants in the court below proved by testimony, to an absolute certainty, that the fire was not observed in or upon the building in which plaintiff's property was situated until about 3:50 A. M. at which time the fire alarm was turned in at the central office. There was a fire box situated at 58th and Washington streets, which is across the street from where the building was situated that burned (testimony of McAlevy, Chief of Tacoma Fire Department, printed transcript, pp. 60-61; of Charles Ryan, City Fireman, printed transcript, pp. 63-64; testimony of C. B. Lindsay, policeman, print-

ed transcript, pp. 65-67; testimony of M. D. Guy, policeman, printed transcript, pp. 68-69; testimony of C. B. Sharman, printed transcript, pp. 70-71), makes absolutely certain that the fire was not discovered more than a minute or so prior to 3:50 A. M.

Thus it was more than two hours after the passing of the train of the O.-W. R. & N. Co. before the fire was observed and it was nearly two hours after the passing of the train of the Northern Pacific Ry. Co.

Defendant in error will say that the witnesses for plaintiff placed the time of the discovery of the fire much earlier, but the testimony of these witnesses was merely guessing, perhaps coupled with a desire to aid the case of plaintiff. It is apparent from reading the testimony of these witnesses and the circumstances which they give of the arrival of the fire department that the actual time of the discovery of the fire by them was just about the time, or a minute or two before the time, the fire department arrived, and the record testimony of the officially kept fire alarm, discloses the time of the day that it was. This fire occurred July 15, 1911, almost two years before the last trial, and more than one year before the first trial, and plaintiff's

witnesses did not undertake to fix the time of the fire with certainty.

FIVE.

INSTRUCTION NO. 16, ASKED FOR BY DEFENDANT O.-W.
R. & N. Co.

This instruction reads as follows:

“16. The jury cannot find any negligence against either company because of a train of the Northern Pacific Railway Company going north about 3:35 A. M., still the fact that this train did pass this building at that time, or about that time, is a circumstance to be considered by the jury in considering whether or not some other agency than that of the Oregon-Washington Railroad & Navigation Company’s freight train or the Northern Pacific Railway Company’s passenger train caused the fire” (printed transcript, p. 105).

The undisputed testimony showed that this Northern Pacific train did pass this building about the time stated; that it was a double header, having thirty or more freight cars, and it having passed before the firm alarm was turned in, the instruction, in our opinion, should have been given.

SIX.

We believe that the court should also have given instruction No. 17, which instruction reads as follows:

“17. The fact that this train did pass the premises going north at the time it did is permissible to be considered by you as a circumstance tending to show that the fire might have been started by a train other than the freight train of the Oregon-Washington Railroad & Navigation Company, or the passenger train of the Northern Pacific Railway Company” (printed transcript, p. 105).

We think the jury had a right to consider, from the fact that this Northern Pacific train passed at 3:35 a. m., that the fire might have been started by its agency.

SEVEN.

The court should have given instructions 18 and 19, asked for by the defendant, O-W. R. & N. Co., which instructions read as follows:

“18. You are instructed that if you find that the fire was not discovered by the witnesses until about 3:30 a. m., then your verdict must be for the defendants.”

“19. If you believe from the evidence that the fire which destroyed plaintiff's property did not begin until shortly before 3:30 a. m., July 15, 1911, then your verdict must be for the defendants” (printed transcript, pp. 105-106).

Either one or both of these instructions should have been given. If the fire did not start or begin until after 3:30 a. m. the time that elapsed after the train of the O-W. R. & N. Co. passed the building

and the beginning of the fire was so great that plaintiff could not legitimately claim that sparks from the engine of this train started the fire. This view is supported by the Thorgrimson case, 64 Wash., and other cases cited under Point Four.

EIGHT.

The court, not having directed a verdict, should have granted a new trial upon the motion of the defendant O-W. R. & N. Co. for the reason that the evidence was insufficient to justify a verdict against it. Also for the reason that the verdict was contrary to the evidence and that substantial justice required that a new trial be granted, and upon the other grounds therein stated (printed transcript, pp. 122-127). The argument upon this is sufficiently covered in the points heretofore discussed.

NINE.

There appears in the transcript a verdict rendered between these parties in a prior action and the order of the court setting aside the verdict (printed transcript, pp. 7 and 8). These are not properly a part of the record in this cause and were not directed to be placed in the transcript by plaintiffs in error.

This record also discloses, in the motion for a new trial, filed by plaintiff in error O-W. R. & N. Co. that in another case involving the same transaction but for the recovery of the building, immediately following the case at bar the jury rendered a verdict for the defendants (printed transcript, pp. 125-126).

We call attention to this latter fact simply because of the appearance in the record of the verdict in the former trial of the case at bar.

In conclusion we submit that upon principle and under the authorities plaintiffs in error are entitled to a judgment of reversal in this cause.

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UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, and OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation,

Plaintiffs in Error,

VS.

CYRUS A. MENTZER,

Defendant in Error.

No. 2298.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

BRIEF OF DEFENDANT IN ERROR

STATEMENT.

This action was brought by the defendant in error against the plaintiffs in error for the burning, by the plaintiffs in error, of a certain sawmill owned by defendant in error, located near the right-of-way of the Northern Pacific Railway Company at or near

South Tacoma, Washington, said fire being caused by sparks emitting from one of the engines of the plaintiffs in error, caused by the defective condition or negligent operation of the said engine. Defendant in error has introduced evidence on all points to constitute a cause of action against the plaintiffs in error, to-wit:

That on the morning of the 15th day of July, 1911, a freight train of the Oregon-Washington Railroad & Navigation Company left the depot at South Tacoma in the direction of the mill of the defendant in error, which is located but a few blocks beyond the said depot, laboring harder than trains usually do in passing that direction (Record, 67, 69, 70).

That between the said depot and the said mill, and for some distance beyond the said mill, the railroad passes over an up-grade (Record, 12).

That as the train of the Oregon-Washington Railroad & Navigation Company passed the mill of the defendant in error it was seen shooting up large sparks, going up higher than the mill and in the direction of the same (Record, 34, 36, 37).

That a short time after the said train passed by said mill a fire was discovered burning on top of the mill, and no fire at that time or until the mill was thoroughly ablaze, was there any fire seen on

or near the ground about said mill, or at the end of the mill nearest the mill boiler (Record, 23, 35, 41).

That the floor of the mill had been sprinkled about six o'clock on the night of July 14, 1911, by employes of the defendant in error, and the fire in the engine of said mill was extinguished about six o'clock on the same day, and no fire was in the engine of said mill after that time (Record, 12, 14).

That about one o'clock on the morning of the 15th day of July, 1911, one John Horn, who owned the shingle mill in the south part of said mill, passed through said building and about the same, and no fire or evidence of fire was seen anywhere about (Record, 14).

That on the morning of the 15th day of July, 1911, the wind, though not strong, was blowing in the direction of the mill from and across said railway tracks (Record, 24).

That other fires had been set by sparks from the engines of the plaintiffs in error in this same vicinity, and within thirty days prior to the setting of this fire (Record, 15, 17, 25, 30, 32, 33).

That no other adequate cause of the fire was attempted to be shown by the plaintiffs in error.

That the property burned was of the reasonable

value of \$3,120.00, as found by the jury (Record, 12).

The statement of plaintiffs in error is mainly correct. There is only one instance in which we desire to make any particular correction. On page 8 of their brief they claim to have shown by *uncontradicted* testimony that there was no negligence in the operation of their trains or of the engines, fire apparatus or spark arresters, and that the same were all in perfect condition and properly constructed, and further say that the defendant in error did not introduce any evidence either in chief or in rebuttal to disprove these facts. These statements, we claim, are not borne out by the record. Plaintiff did introduce evidence to the effect that these trains in question did throw out an unusual amount of sparks and of unusual size (Record, 34, 36, 37), and defendants' own witnesses testified that if such sparks were emitted of the size and in the numbers claimed, then the spark arresting apparatus must have been in a defective condition (Record, 86 and 92). We will call the court's attention to this again in the argument on this phase of the question.

ARGUMENT.

The foregoing statement, which is borne out by the evidence, conclusively shows that some evi-

dence was introduced by the plaintiff on every point necessary to be proven by him sufficient to make a *prima facie* case for the plaintiff, and raise presumption that there was negligence on the part of the defendants, and when this is done it is the province of the jury and not of the court to decide whether the defendants' proof was sufficient to overcome this presumption. This being so, unless error has been committed by the court in admission of evidence, its instructions or otherwise, this verdict should stand. Did the court commit any errors in the trial of the case? We think the record does not show any such errors.

I.

Appellants contend in their argument "One" that the plaintiff having sued the defendants jointly upon one cause of action could not recover upon proof of distinct separate torts, one based upon the operation or construction of a particular engine of the Northern Pacific Railway Company, and one based upon a different claim of negligence in the operation or construction of an engine of the Oregon-Washington Railroad & Navigation Company, an entirely different engine and a different train, and at the close of the case moved for a directed verdict in the following language:

"The plaintiff having sued upon a joint cause of action alleged against both defendants, and having

proved, if it has proved anything, a separate act by each defendant is not entitled to maintain this action." Appellants' Brief, pages 23 and 24.

It is admitted, and was contended during the trial by both parties, and so taken by the court, that the defendant, Northern Pacific Railway Company, would be liable with the other defendant should the negligence of the other defendant have caused the fire, by reason of the fact of the Northern Pacific Railway Company's ownership of the road in question. This is clearly shown by the instructions of the court (Record, 112), and the requested instructions of the defendant, Oregon-Washington Railroad & Navigation Company (Record, 99, 100, 101), so that as to the verdict actually rendered in this cause on the evidence submitted and the judgment rendered thereon, both defendants were liable jointly for the proven negligence of the Oregon-Washington Railroad & Navigation Company. In the evidence introduced all of the occurrences surrounding the scene of the fire that might have any bearing on the origin of the same was allowed to be introduced by the court, and properly so. And appellants now insist (Brief, page 21), and did at the time of trial, that the fact of the Northern Pacific train going north should be taken into consideration by the jury in ascertaining the cause of the fire (Record, 103-4). The jury found that the evidence introduced by the plaintiff

and defendant was sufficient in their minds to show conclusively that the fire originated by sparks from the Oregon-Washington Railroad & Navigation Company's train, number 691, and the court, at their request, instructed the jury as above shown, to the effect that it would not be necessary for them to consider the negligence of the defendant, Oregon-Washington Railroad & Navigation Company, at all until they had first determined the manner in which the fire started, and that it was started by a spark or sparks thrown off by an engine of that company, further saying that if the fire was started in any other way, or if there was not a preponderance of evidence showing that it started from an engine of that company, then their verdict must be for the said defendant, Oregon-Washington Railroad & Navigation Company, and that it was not necessary for them to consider any other question in the case. Appellants speak many times through their brief of the plaintiff attempting to prove two distinct and independent torts. We understand the law to be that if two or more defendants are responsible legally for the act of one of them by reason of their relationship (of lessor and lessee in this case) it is proper to bring a joint action against them both.

C. B. & Q. R. R. Co. vs. Willard, 220 U. S. 413.

Heron vs. St. P. & M. M. Ry. Co., 71 N W. (Minn.) 706.

It is also true, as a matter of law, that when two companies are jointly or in any manner operating a railroad, and the negligent action of each contributes to the same injury, then they are both liable and may be sued jointly.

Matthews vs. Delaware L. & W. R. Co., 22 L.

R. A. (N. J.) 261.

Cuddy vs. Horn, 46 Michigan 542, 41 American Rpts. 178.

Brown vs. Cox Bros. & Co., 75 Federal 689.

Clinger vs. Chesapeake & O. R. Co., 15 L. R. A. ns. 998-1000.

Strauhal vs. Asiatic S. S. Co., 85 Pacific (Ore.) 230.

In this case all of the evidence went to show certainly that the Oregon-Washington Railroad & Navigation Company was guilty of such negligence, and under the general rules and the law of this case, both companies were liable therefor. There was also some evidence which went to show that the Northern Pacific Railway Company was also negligent in the construction and management of its engines, and if so and the fire was caused by the joint action of both companies in the management of this road, then again both companies would be liable and might be sued jointly, although one

was more negligent than the other, and no error could be predicated upon the introduction of any of such evidence. But the jury having found that the sole proximate cause of the fire was the negligent issue of sparks from the defendant, Oregon-Washington Railroad & Navigation Company's engine, and that by reason thereof it and its co-defendant were liable under the instructions of the court, the admission by the court of evidence as to the Northern Pacific Railway Company would be, if error at all, error without prejudice. The Northern Pacific Railway Company could not complain of the same because no verdict or judgment was based thereon against them. Its co-defendant, the Oregon-Washington Railroad & Navigation Company, could not predicate error upon the same for such evidence if the same became strong enough to indicate that the fire was caused by the engine of the Northern Pacific Railway Company rather than their own would be benefited thereby in proportion to the strength of such evidence.

II.

TESTIMONY AS TO OTHER FIRES.

Plaintiffs in error would have the court understand that the train sheet of the plaintiffs in error as introduced in evidence limited the proof of other fires to those set by a certain particular engine, but the record shows, page 11, that no at-

tempt was ever made to so limit the defendant in error to prove that a certain engine set this fire, and when no particular engine is designated as having set the fire, evidence of other fires set at other times by other engines is always admissible to show the negligent habits of the railroad company, and the possibility and consequent probability that some locomotive of the company set this particular fire.

This proposition of law is admitted by plaintiffs in error in their brief on page 27, but they claim that in this case there was a particular engine attempted to be proven, but the complaint does not show any allegation as to any particular engine, and the stipulation on page 11 of the record shows only that the train sheet was admitted showing all of the trains that passed the point where the fire occurred during that night and morning.

Plaintiffs in error cite the *Grand Trunk Railway Company vs. Richardson*, 91 U. S. 454 (23 Law Edition 356), and quote from said case to show that that case was not contrary to their contention, but there is another part of that case that they did not quote, which shows that the evidence there designated the particular engine more closely than in this case. In the same case, page 362, the court says:

"The third assignment of error is that the plaintiffs were allowed to prove, notwithstanding objection of the defendant, that at various times during the same summer before the fire occurred, some of the defendant's locomotives scattered fire when going past the mill and bridge without showing that either of those which the plaintiffs claimed communicated the fire was among the number, and without showing that the locomotives were similar in their make, their state of repair and management to those claimed to have caused the fire complained of."

The court still held that the evidence was admissible, and in a statement of the case by the court, on page 358, we find the following:

"The plaintiff's testimony tended to show that the fire originated from one of two locomotive engines belonging to the defendant, the first hauling a passenger train westerly past plaintiff's mill about half past one in the afternoon, and the other hauling a freight train easterly past the mill about four o'clock in the same afternoon."

So we see in that case the plaintiff's evidence more definitely established the particular engine than was attempted to in this case.

We further desire to call the court's attention to the decision of this court in *Northern Pacific Railway Company vs. Lewis, et al.*, 51 Federal 658, where this question was passed upon by this court, and reference therein made to the above cited case, *Railway Company vs. Richardson*, this court saying:

“It is assigned as error that the court permitted evidence of other fires set at other points on the road, and at other times and by other engines, and instructed the jury to take into consideration the fires so set in determining the question of negligence. The complaint did not designate the particular engines which were claimed to have caused the fire. The testimony, however, tended to show that the fire originated from one of two certain locomotives, and that these and other locomotives had set other fires, both before and after the injury complained of. This evidence was clearly admissible under the authority of the decision in the case of *Railway Company vs. Richardson*, 91 U. S. 454, as ‘tending to prove the possibility and consequent probability that some locomotive caused the fire, and as tending to show the negligent habit of the officers and agents of the Railway Company.’ ”

From the above we see that both the Supreme Court of the United States and this Court have held that evidence of other fires was admissible in cases stronger against the proposition than the case at bar.

To the same effect see:

Campbell vs. Mo. Pac. Ry. Co., 42 A. S. R.
(Mo.) 530 (535).

Koontz vs. O. R. & N. Co., 20 Or. 3.

III.

INSTRUCTIONS AS TO OTHER FIRES REFUSED.

By the instruction complained of, plaintiffs in error asked the court to take from the jury all

consideration of other fires on the ground that on cross-examination of the plaintiffs' witnesses they had shown that there was no evidence to connect the Oregon-Washington Railroad & Navigation Company's engines in the setting of such fires.

An examination of the record shows that it became a question for the jury on the evidence submitted as to whether they had destroyed the effect of the evidence in chief as to evidence of other fires by said defendant. The court, instead of taking it from the jury entirely, did instruct them, and properly so as far as the evidence would warrant (Record, 117), where the court instructed the jury as follows:

"In this case there was some evidence admitted concerning other fires set within thirty days previous to the fire in question. You will understand that unless there is some evidence to show that those fires were set by engines of the Oregon-Washington R. & N. Company, you will not consider that evidence as in any way affecting that company, unless, as I say, there is evidence to show that those fires were set by the engines of that company, or some of them."

IV.

REQUESTED INSTRUCTIONS NUMBERS 16 AND 17 WERE
PROPERLY REFUSED.

These instructions were asking the jury to consider the fact that the Northern Pacific Railway

Company's train going north, as shown by the train sheet, was a circumstance to be considered by them in ascertaining the cause of the fire. This is possibly true, and the evidence was before the jury for them to consider, it was mentioned by all counsel in the argument and the court covered the same so far as it was necessary in its instruction to the jury to the effect that if the fire was started:

“In any other way, then, their verdict must be for the defendant, Oregon-Washington Railroad & Navigation Company, and this was all the defendants could ask.”

The instruction so given is found in Record, page 114, and is as follows:

“It will not be necessary for you to consider the negligence of the defendant the Oregon-Washington Railroad & Navigation Company at all until you have first determined the manner in which the fire started, and that it was started by a spark or sparks thrown off by an engine of that company. If the fire started *in any other way*, or if there is not a preponderance of evidence showing that it started from an engine of this company, then your verdict must be for the defendant, the Oregon-Washington Railroad & Navigation Company, and it is not necessary for you to consider any other question in the case, and you will return a verdict for the defendant, the Oregon-Washington Railroad & Navigation Company.”

V.

REFUSAL OF INSTRUCTIONS NUMBERED 18 AND 19
ASKED BY DEFENDANT.

These instructions were properly refused because courts have held repeatedly that this is purely a question for the jury and not for the court, the following case being squarely in point and there sustaining the court in refusing to give these instructions.

McCullen vs. Chicago & N. W. Ry. Co., 101
Federal 366.

Aspland vs. Great Northern Ry. Co., 63 Wash.
164.

Halley vs. Sumter Valley Ry. Co. (Ore.), 12
L. R. A. New Series 526.

These instructions were further properly refused for the reason that witnesses for the defendant in error testified, without contradiction, that a spark falling in dust and sawdust such as accumulated on this building, might smolder several hours before bursting into flame (Record, 93 and 95).

VI.

INSUFFICIENCY OF EVIDENCE.

The only question not heretofore covered is the objection to the verdict and judgment on account of the insufficiency of the evidence. In our pre-

liminary statement, which is borne out by the records we have shown, and plaintiffs in error in their brief admit the same, that their train, which the jury found caused the fire, did pass the mill in question in the morning some short time before the fire was discovered. That their witnesses and ours testified that it was laboring harder than trains usually do in going out of the station at South Tacoma within a few blocks of the mill. One witness testified that as it went by the mill it emitted an unusual number of extraordinarily large sparks, some of them varying from the size of a lead pencil to a dime. That the wind was a slight breeze blowing the sparks in the direction of the mill. That within twenty minutes to half an hour after the passing of said train, the fire was first discovered on the roof of the mill, and that no fire at that time was underneath in the body of the mill, or on the ground, and that no other adequate cause was shown for the origin of said fire. Under this evidence the plaintiff would be entitled to a verdict for the value of the property destroyed owned by him, should the jury believe the same, even without considering the evidence as to the Oregon-Washington Railroad & Navigation Company's trains setting other fires previous to this one. This being the case, it was the duty of the court to give

the same to the jury no matter what the evidence of the defendants might have been.

The only correction or objection that we have to make to the statement of the plaintiffs in error under this branch of the argument is their contention on page 39 of their brief that there was no testimony in rebuttal or otherwise to show that their spark arresters were not in perfect condition, and that they were not negligently operated, claiming that by reason of there being positive and uncontradicted testimony that their spark arresters were of the most approved pattern in general use, and were in good condition of repair, was conclusive even though there might be some evidence of negligence.

In the first place, plaintiffs in error are mistaken in saying that such evidence was uncontradicted, for the witness Ebert testified that the Oregon-Washington Railroad & Navigation Company, which the jury found set the fire, was emitting an unusual number of sparks, some of them as large as a dime, and that the said engine was working hard (Record, 34 and 36). Plaintiffs in error's own witnesses, Zintz and Perley, testified that with this condition of affairs, so testified to by Ebert as existing, the netting must have been out of repair, and there must have been holes therein large enough for these sparks to escape (Record, Zintz 36,

Perley 92). This being the case, the jury had a right to believe Ebert, and also to believe Zintz and Perley; and if they did so believe, the evidence justified them in returning the verdict complained of.

In the second place, we do not admit the legal contention of plaintiffs in error that their positive evidence that the spark arrester was the most approved in general use, and was in good condition and repair is conclusive. Our contention being that the law is that, when the plaintiffs in a case of this kind show by evidence that sparks of unusual size and number were emitted by the defendants' engines, and that other fires were set by engines of the same company, or any other evidence of like nature, that there then arises such a presumption of negligence that, though the defendant companies' officers and agents do testify that their spark arresting apparatus was of the most approved form in general use, and in perfect condition, the jury are not compelled to believe them, but have a right to consider their evidence in connection with all other evidence on the same question, and render such decision as to them seems justified by the whole evidence. To this effect see

Toledo, St. Louis & W. Ry. Co. vs. Star Flouring Mill, 146 Federal 953.

This was an action against the railway company for loss by fire caused by shooting sparks from the defendants' locomotive. The only question to be considered was whether the spark arrester device was in good condition upon the day when the fire was started. The jury found that it was not.

In this case there was substantial uncontradicted evidence that the netting of this particular engine which it was alleged set the fire had been replaced by new netting thirty days before the fire, and that the average life of such netting was from six to eight months. The servants of the railway company testified that this netting was inspected on the night before the fire, and again within half an hour after the fire, and found to be in good condition.

The plaintiff introduced in rebuttal evidence that other fires had been set along the right-of-way by this locomotive, and the court held: The jury were not bound to accept the evidence of the inspector and other servants of the defendant as to the condition of the spark arrester as conclusive, but could weigh this testimony with other testimony introduced in the case.

Burke vs. Louisville & Nashville Ry. Co., 19
American Rpts. 618.

Here was another case where the railway company were accused of negligence in allowing sparks

to be emitted from the smokestacks of their engines which set on fire the home of the plaintiff. The train passed about 9:40 p. m., and some time after 10:00 o'clock the house was found burning. It was shown that when the trains passed this neighborhood they were shooting sparks. The defendants showed that on this night their spark arresters were in good condition, and were not emitting an unusual quantity of sparks.

The inspector testified that on the same evening before the two engines which were alleged to have set the fire left the yards he had carefully inspected the smokestack of each, and both were found to be in perfect order. That the locomotives used at that time by the defendants were of the best and most approved class, and the witnesses testified for the defendants that with these properly constructed spark arresters the engines could not throw out sparks large enough to do damage.

Yet this case was submitted to the jury, who returned a verdict in favor of the plaintiff, and, although a new trial was granted, it was on an entirely different matter, and this question of the sufficiency of the evidence was held to be a matter for the consideration and determination of the jury.

Plaintiffs in error further complain that too long a time elapsed between the passing of the train found to have set the fire and the time of the dis-

covery of the fire. This time, according to their witnesses, was some two hours, but according to the defendant in error's witnesses, was from twenty minutes to half an hour. Of course, plaintiffs in error claim that the evidence showing so short a time was merely guess work, but the jury are the judges of the weight and credibility of the evidence submitted. But even though it should be true that it was two hours or more after the passing of their train, yet, in view of the circumstances surrounding the setting of the fire and the evidence of the witnesses, Fettig and Doud, to the effect that sparks might fall in sawdust such as accumulated on the roof of this mill, and smolder there for several hours before bursting into flame, this lapse of time was only one element to be considered by the jury in arriving at the proximate cause of the fire, and the authorities are numerous to that effect. To the same effect see:

13 American and English Encyclopedia of Law, Second Edition, 442-493.

Abrams vs. Seattle & Montana Ry. Co., 27 Wash. 507.

This was an action against the Seattle & Montana Ry. Co. for value of a barn, some hay and certain farming utensils destroyed on the 10th day of October, 1896. The evidence showed that a train passed the premises at 11:57 a. m. Between

an hour and an hour and a half after this time smoke was seen arising out of the comb of the roof of the barn at the end nearest the railway track, followed by flames, which afterwards consumed the building.

In this case the jury found for the plaintiff, and in passing upon the sufficiency of the evidence the Supreme Court said:

“The courts of this country in this class of cases, while adhering to the rule that some act of negligence on the part of the railway company must be averred and proven in order to warrant a recovery, yet have been extremely liberal when called upon to pass upon the evidence which a jury has found sufficient,” citing *Union Pacific Railway Co. vs. De Bus*, 12 Colorado 294; also 66 Wisconsin 161 (28 N. W. 170).

Wick vs. Tacoma Eastern Ry. Co., 40 Washington 408.

This was an action brought to recover damages for the damage of personal property by the Tacoma Eastern Railway Company, claiming plaintiff had wholly failed to prove the origin of the fire. The court held: “While we agree with the counsel for appellant that in cases such as this the origin of the fire must be established to a reasonable certainty, but under this rule we would not be warranted in interfering with the verdict.”

Halley vs. Sumter Valley Co. (Ore.), 12 L. R. A. ns. 526.

In this case the trains of the defendant ran by the property about 9:30 or 10:00 o'clock in the morning, which were seen shooting up sparks. Nothing further was noticed until between 12:00 and 1:00 o'clock, when the fire was first noticed.

In appealing from a verdict and judgment of the plaintiff, the court said:

"The inference in this case may not be strong, but is some evidence, and we at least think it creates a probability that the defendant's engines caused the fire,"

and refused to interfere with the verdict of the jury.

Aspland vs. Great Northern Ry. Co., 63 Washington 164.

An action for destruction of certain cordwood of the plaintiff by fire emitted by the defendants' engines. In this case an engine passed the plaintiff's property at 3:15 o'clock in the morning, and the fire was first seen about 4:24 o'clock in the morning.

Evidence in this case was introduced showing that fire was repeatedly set by the defendants' trains. To rebut this the defendants showed that its engines were in proper working order, but the court held that this was only rebuttal evidence,

the sufficiency of which was a question for the jury and not for the court, and refused to set aside a verdict in favor of the plaintiff.

There is another consideration in this case which should cause this court to hesitate in interfering with the judgment rendered herein. This case has been tried upon the same evidence before two juries, and each jury has found for the plaintiff, and when twenty-four men have agreed that the plaintiff in error, the Oregon-Washington Railroad & Navigation Company, was negligent as alleged in the complaint of the defendant in error, this court, as was said in *McCullen vs. Chicago & N. W. Railway Co.*, "would be perhaps justified in regarding that test as conclusive" (Record, 7 and 8).

In conclusion, it now appearing from the records in this case that the jury were justified in finding their verdict under the evidence submitted, and that the court committed no error in the trial of this case, we ask this court to sustain the judgment of the lower court, and refuse to grant a new trial.

Respectfully submitted,

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IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COM-
PANY, a corporation, and OREGON-
WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a corporation,
Plaintiffs in Error,

No. 2298.

vs.

CYRUS A. MENTZER,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT OF THE WESTERN
DISTRICT OF WASHINGTON
SOUTHERN DIVISION.

Reply Brief

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Reply Brief

Inasmuch as it was stipulated between the parties that oral argument is waived, and the cause should be submitted on the briefs, with the privilege on the part of plaintiffs in error to file a reply brief, plaintiffs in error make the following suggestions:

I.

Pages 1 to 11, brief of defendant in error, authorities are cited sustaining the proposition that where two or more defendants are responsible legally for the act of one of them, by reason of their relationship, it is proper to bring a joint action against both, and also where two companies are operating a railroad jointly and the negligent action of each contributes to the same injury they are both liable.

This point, even if well taken, does not answer the contention of the plaintiffs in error that in this action defendant in error was seeking to recover upon proving *separate* and *distinct torts*, based upon the operation and construction of particular engine of the separate plaintiffs in error. True, the Northern Pacific is only held liable in this case in the judgment because the verdict was against the O.W. R. R. & N. Co., but the fact remains that the plaintiffs in error were required to try two separate and distinct tort actions together in the lower court. If this was wrong the error was substantial and certainly no authority or argument is necessary in this court to show that this was wrong in law and unjust in fact.

Defendants in error offered evidence to show an independent act of negligence on the part of the Northern

Pacific Railway Co., and what it claimed was proof of other fires set by the Northern Pacific. If we should assume that the proof was admissible, which we do not think it was, the plaintiff in error, O.-W. R. R. & N. Co., was required to let the case go to the jury on proof which it was claimed by defendant in error tended to show that other fires were set by the N. P. Ry. Co. and the Great Northern Railway Co. As this tended to show that several different railroads were in the habit of setting fires it could not but be harmful when considered by the jury.

II.

Defendant in error contends that as he did not allege in his complaint the specific engines which caused the fire that proof of other fires generally thus became admissible.

The facts were plain that a particular engine was the one which defendant in error claimed caused the fire, and under these circumstances the same rule applies as would have applied if defendant had so alleged in his complaint.

This is especially true when we consider the actual situation in this case. At page 26 of the brief of defendant in error reference is made to the fact that this was the second trial of the case and reference is made to printed record pages 7 and 8, the verdict in the previous trial. We called attention to the fact that this was not

placed in the record by plaintiffs in error in our original brief. The defendant in error having evidently caused it to be placed there and at least relying upon the fact, as shown in the record, ought also to be bound by all argument that can be based thereon. Defendant in error also states that both cases were tried upon the same evidence (Answering Brief, p. 26), which is true.

This discloses that this case was first tried several months prior to the second trial. From the time of the first trial the defendant in error certainly had actual and full knowledge of what engine he was claiming caused the fire. This being so we can not see that he occupies any different position from what he would if he had alleged the fact directly in his complaint.

The case of *N. P. Ry. Co. vs. Lewis*, 51 Fed. 658, cited by defendant in error, in our opinion, is not applicable under the facts in this case. There the testimony tended to show that the fire originated from one or two locomotives and that *these* and other locomotives of defendant had set other fires.

Again, in that case the statutes of Montana were relied upon. These statutes made *prima facie* evidence of negligence that dangerous or combustible material on right of way was set upon fire emanating from the operation of a railroad.

Even if that case intended to hold that under all circumstances proof of other fires is admissible still that would not justify the introduction of evidence generally of fires set by three different railroads or two different ones without showing specifically which one of the railroads had set each of these previous fires.

The instruction given by the court, referred to at page 15 of the brief of the defendant in error, did not in any way cure this. An instruction to the jury that unless there was some evidence showing that these previous fires were set by the O.W. R. R. & N. Co. it should not consider the evidence as in any way affecting that company, did not cure the evil. The point of plaintiffs in error being that there was no sufficient evidence to justify the submission of this question to the jury, and if the evidence was insufficient the instruction did not justify the refusal of the court to give the instruction asked for by plaintiff in error O.-W. R. R. & N. Co. upon this point.

III.

Defendant in error contends at pages 15 and 16 of his brief that the general instruction given by the court to the effect that before the jury could find a verdict against the O.-W. R. R. & N. Co. it would have to find that the fire started from one of the engines of that company

was sufficient to justify a refusal of the court to give numbers 16 and 17, asked for by plaintiff in error O.W. R. R. & N. Co., and commented upon and set forth in full at pages 44 and 45 of our original brief. The language of these requests as asked for simply called the attention of the jury that the fact was a circumstance to be considered by them as to whether some other agency than that of the O.-W. R. R. & N. Co.'s freight train or the N. P. Ry. Co.'s passenger train crossed the fire. It seems to us that under the state of facts existing either one or both of these instructions should have been given. Evidence had been taken and submitted showing that this double-header freight train of the N. P. Ry. Co. had passed about 3:35 A. M., and the jury without the instruction requested might very well believe that this train had nothing to do with the case, the court not having given any instructions thereon, and the defendant in error not claiming any liability against the plaintiffs in error on account of this train, especially against the O.-W. R. R. & N. Co., the engine of which the jury found set the fire. If the instruction had been given, the jury might have found that the double-header, instead of the O.-W. R. R. & N. freight, set the fire.

IV.

At page 17 it is stated in the brief of defendant in error that the request for instructions 18 and 19, commented upon and given in full at page 45 of the original brief of plaintiffs in error, to the effect that the jury should find a verdict for the defendant O.-W. R. R. & N. Co. if the fire was not discovered or did not begin until about 3:30 A. M. were properly refused for the reason that witnesses for defendant in error testified that a spark falling in dust or saw dust, such as had accumulated on this building, might smolder several hours before bursting into flame.

We submit that this testimony was entirely insufficient for the purpose mentioned. The witnesses had no knowledge of the condition of the mill or the top of the roof and the question was not based upon any circumstance proven in the case. This testimony is found at pages 93 to 96 of printed record.

As we read the testimony there was no evidence introduced showing any state of facts existing upon which these two witnesses were interrogated. If these two requested instructions, or either of them, otherwise should have been given this testimony manifestly did not alter the situation. On the other hand, the uncontradicted evi-

dence was that everything about the mill was very dry and highly inflammable; and that the whole mill burned within a short time after 3:30. Under this evidence, and the fact that two N. P. Ry. Co. trains had passed the mill since the O.-W. R. R. & N. Co. train passed, one of these N. P. Ry. Co. engines throwing sparks, we think the instruction should have been given.

V.

On the question of the insufficiency of the evidence the defendant in error cites several cases for the purpose of showing that the evidence was sufficient to be submitted to the jury. An examination of these cases discloses that a number of them were cases in which fires originated upon the right of way of the company, sparks having set fire to combustible material permitted to gather on the right of way. Such cases have no bearing here, for the company was liable for permitting combustible material on its right of way and might be guilty of negligence without regard to the condition of its engines or its operation. Of course, there are many decisions of the court upholding sufficiency of the evidence and many to the contrary. To a large extent each case stands by itself and has to be determined by the circumstances affecting it. In

this case it does not appear to us that there is proof of negligence at all, or, if there was any, it was so extremely slight that it was overcome by the positive proof of plaintiffs in error.

The fact that witnesses Zintz and Perley testified that if the witness Ebert's testimony about escaping sparks was true the netting must have been out of repair and there must have been holes therein large enough for these sparks to escape, did not add anything to the situation in the case. The testimony of plaintiff in error, O.W. R. R. & N. Co., showed a perfect netting and it was manifest that if this testimony was true that sparks as large as a dime would not and did not escape. But Ebert's testimony upon this was merely an estimate or guess at long range, and was not sufficient to overcome positive proof.

If the testimony in this case is sufficient to justify its submission to the jury, it seems to us that it is hardly possible to conceive a case that should not be submitted to the jury, when it involves the question of fire being started by sparks from an engine. It practically brings the courts to the point that the jury must in all cases be the absolute judges of the matter, and their verdicts may

be based on and sustained by evidence amounting to mere guesses and surmise, as against positive, uncontradicted evidence showing the guess or surmise to be untrue.

VI.

Defendant in error, at page 26 of his brief, says that this case has been tried upon the same evidence before two juries and each found for the plaintiff, and that, therefore, the court would be justified in regarding this test as conclusive. If the evidence was legally insufficient to go to the jury we can not see how this argument should have any weight. It might also be said, two juries in the *Allen* case, referred to in our original brief, and in the motion for a new trial, upon the same state of facts, returned verdicts for the plaintiffs in error; and also another jury in the case of *Horn Bros.* versus the same defendants, based upon the same evidence, returned one verdict for plaintiffs in error. This was the only verdict in that case as no new trial was asked for or granted.

CONCLUSION.

In conclusion we again respectfully submit that for

errors presented in our original brief the case should be reversed and a new trial granted.

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Error, N. P. Ry. C.*

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No. 2307

United States
Circuit Court of Appeals

For the Ninth Circuit.

SHERMAN-CLAY & COMPANY,
a Corporation,

Appellant,

vs.

SEARCHLIGHT HORN COMPANY,
a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
of the Northern District of California,
Second Division.

FILED

SEP 15 1913

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the District Court of the United States for the Northern District of California, Second Division.

SEARCHLIGHT HORN COMPANY,

Complainant,

vs.

SHERMAN CLAY & COMPANY,

Defendant.

Bill of Complaint for Infringement of Patent.

To the Honorable, the Judge of the District Court of the United States for the Northern District of California, Second Division, Sitting in Chancery:

The Searchlight Horn Company, a corporation created and existing under and by virtue of the laws of the State of New York and having its principal place of business in the City of New York in said State, complainant, brings this its bill of complaint against Sherman Clay & Company, a corporation duly organized and existing under and by virtue of

the laws of the State of California, and having its principal place of business at the City and County of San Francisco, in the State of California, defendant, and thereupon your orator complains and says:

1. That at all the times hereinafter mentioned your orator was and still is a corporation organized and existing under and by virtue of the laws of the State of New York and having its principal place of business at the City of New York in the State of New York; and at all said times the defendant herein was and still is a corporation organized and existing under and by virtue of the laws of the State of California and having its principal place of business at the City and County of San Francisco, in the State of California. [1*]

2. That heretofore, to wit, on and prior to April 14, A. D. 1904, one Peter C. Nielsen, a citizen of the United States, residing at Greenport in the county of Kings, in the State of New York, was the original and first inventor of certain new and useful improvements in Horns for Phonographs and similar machines, more particularly described in the letters patent hereinafter referred to; that said improvements were new and useful inventions not known to or used by others in this country, nor patented or described in any printed publication in this or any foreign country before the said invention thereof by the said Nielsen, nor more than two years before the application of said Nielsen for a patent therefor hereinafter alleged, nor in public use or on sale in this country for more than two years prior to said

*Page-number appearing at foot of page of original certified Record.

application, and for which improvements no application for a foreign patent had been made or filed by him or his legal representatives or assigns in any foreign country more than 12 months prior to his application therefor and which improvements had not been abandoned by the said Nielsen.

3. And your orator further shows unto your Honors that heretofore, to wit, on April 14, A. D. 1904, said Peter C. Nielsen filed in the Patent Office of the United States an application in writing praying for the issuance to him of letters patent of the United States for said invention; that such proceedings were had and taken in the matter of said application by the officials of the Patent Office of the United States that hereafter, to wit, on October 4, A. D. 1904, letters patent of the United States were granted, issued and delivered by the Government of the United States to the said Peter C. Nielsen, whereby there was granted and secured to him, his heirs and assigns, for the full term of seventeen years from said last-named date the sole and exclusive [2] right, liberty and privilege to make, use and sell the said invention throughout the United States of America and the territories thereof; the said letters patent were issued in due form of law in the name of the United States of America under the seal of the Patent Office of the United States, signed by the Commissioner of Patents of the United States, and bore date October 4, A. D. 1904, and were numbered 771,441, all of which, together with a more particular description of the said invention will more fully appear from the said letters patent themselves, which

are ready in court to be produced by your orator or a duly authenticated copy thereof.

4. That prior to the issuance of said letters patent all proceedings were had and taken which were required by law to be had and taken prior to the issuance of letters patent for new and useful inventions.

5. And your orator further shows unto your Honors that by a regular chain of assignments made in writing duly executed and acknowledged and recorded in the Patent Office of the United States, your orator heretofore, on January 4, 1907, became and ever since continuously has been and is now the sole owner and holder of the said letters patent and of all the rights, liberties and privileges by them granted and conferred throughout the United States of America and the territories thereof.

6. And your orator further shows unto your Honors that the invention covered by said letters patent and protected by the claims thereof is one of great value and utility, and your orator and its predecessors practiced the same extensively and made and sold large numbers of devices covered by said letters patent, and have expended large sums of money in introducing the same to the public and in making and selling said devices, and upon each one of said devices so made and sold by your orator the word "Patented," together with the date and number of said letters patent have been stamped and marked.

[3]

7. And your orator further shows unto your Honors that heretofore, to wit, on the 9th day of May, 1911, your orator commenced an action at law in this

Honorable Court against Sherman Clay & Company, the defendant herein, and on that day filed its declaration in due form of law whereby it alleged all the facts hereinabove stated in this bill of complaint, and charged that the defendant, Sherman Clay & Company, had infringed upon the said letters patent to your orator's great injury and damage in the sum of Fifty Thousand Dollars, and prayed that a judgment be rendered against said defendant for said damages. That thereafter, to wit, on May 25, 1911, said defendant appeared in said action at law by its attorneys learned in the law and filed an answer denying all the allegations in the said declaration and thereafter, to wit, in due season and thirty days before the trial of said action filed a notice in writing, under section 4920 of the Revised Statutes, setting up that the said Nielsen was not the first or original inventor or any inventor of the invention described, claimed and patented in and by said letters patent, No. 771,441, but that long prior to the supposed invention thereof by the said Nielsen the thing sought to be patented by the said patent was shown, indicated, described and patented in and by certain prior patents of the United States and of Great Britain, which were specified by date and number, and that long prior to the supposed invention of said Nielsen the thing attempted to be covered by the said patent had been manufactured, used and sold by and known to others in this country, and the names and addresses of the persons alleged to have had such prior knowledge and use and the places where the same were used were set up in de-

tail in the said notice; that thereafter, upon issues so joined, the said action at law came on duly and regularly for trial before the above-entitled court and a jury, which said trial commenced on the first day of October, 1912, and was completed on October 4th, 1912; that evidence was introduced by both sides [4] and the case was fully and fairly tried on its merits, and after argument by counsel on both sides was submitted to the jury for its decision; that thereupon, on the 4th day of October, 1912, said jury returned its verdict in favor of the plaintiff in said action, complainant herein, and against the defendant in said action, defendant herein, and assessed damages in favor of the plaintiff and against the defendant for the infringement aforesaid in the sum of \$3,578.00. Thereupon a judgment was duly made and entered in favor of the plaintiff and against the defendant for \$3,578.00 and the costs of suit, which said judgment has never been changed, altered or modified, but is still in force and effect.

8. And your orator further shows unto your Honors that within six years last past, and also since the commencement of the aforesaid action at law, and since the rendition of the verdict and the entry of judgment therein as above recited, the defendant herein, without the license or consent of your orator at the City and County of San Francisco and State of California, and elsewhere, has used and sold, and is now using and selling, horns for phonographs containing and embracing the invention described, claimed and patented in and by the said letters patent, and particularly by claims 2 and 3

thereof; that the horns so used and sold as aforesaid by the defendant were and are known as the "Victor Phonographic Horns," and were made according to the specification of the said letters patent, No. 771,441, and contain and embrace the invention therein described, claimed and patented, and constituted and do constitute an infringement upon claims 2 and 3 of the said letters patent; that the aforesaid horns and particularly the horns used and sold by the defendant since the commencement of the said action at law, and since the rendition of the verdict and judgment therein were and are of the same identical design, form and construction as the horns which were held by the jury in said action at [5] law to be an infringement upon claims 2 and 3 of said Nielsen patent, it being a fact that since the rendition of the said verdict and the entry of the said judgment the defendant has continued to use and sell and is now using and selling the same style of horns and continuing the same infringement that it was guilty of prior thereto.

9. And your orator further shows unto your Honors that the defendant threatens and intends to continue, and, unless restrained by this Court, will continue to use and sell said infringing horns without the license or authority of your orator, and if defendant is permitted so to do, your orator will suffer great and irreparable injury for which it has no plain speedy or adequate remedy at law; that your orator has notified the defendant of the infringement aforesaid and requested the defendant to cease and desist therefrom, yet nevertheless the defendant has

continued after such notice to use and sell horns for phonographs containing the invention aforesaid.

10. And your orator alleges upon information and belief that the defendant has realized large gains and profits by reason of its said infringement aforesaid, the exact amount of which is unknown to your orator, and that your orator has suffered damages from and by reason of said infringement, the exact amount of which is likewise unknown to your orator.

11. And your orator further shows unto your Honors that if the defendant is allowed to continue its infringement aforesaid, your orator will suffer great loss and damage, and for the wrongs and injuries herein complained of your orator has no plain, speedy or adequate remedy in the ordinary course of law, and forasmuch as your orator is without remedy in the premises save in a court of equity where matters of this kind are properly cognizable and relievable,

TO THE END that the defendant, Sherman Clay & Company, [6] may, if it can, show why your orator should not have the relief herein prayed (but not under oath or seal, an answer under oath and seal being hereby waived), according to the best and utmost of the knowledge, recollection and belief of its officers, full, true, direct and perfect answer make to all and singular the matters and things hereinabove charged, your orator prays that the said defendant may be enjoined and restrained from infringing upon the said letters patent, and particularly upon claims 2 and 3 thereof, and be decreed to account for and pay over to your orator the gains

and profits realized by the defendant, and in addition thereto the damages sustained by your orator by reason of the infringement of said letters patent aforesaid together with costs of suit.

May it please your Honors to grant unto your orator the writ of injunction issued out of and under the seal of this court upon the filing of the bill of complaint provisionally and until the final hearing, enjoining and restraining the said defendant, Sherman Clay & Company, its agents, servants, officers, clerks, employees and attorneys from making, using or selling any horns for phonographs or similar instruments containing the invention described in the specification of said letters patent and claimed and patented in and by claims 2 and 3 of said letters patent, and that upon the final hearing of this case said injunction be made perpetual and that your orator may have such other and further relief as to your Honors may seem meet and proper and in accordance with equity and good conscience.

May it please your Honors to grant unto your orator the writ of subpoena ad respondendum directed to the defendant Sherman Clay & Company, commanding it by a day certain and under a certain penalty to be and appear in this Honorable Court then and there to answer this bill of complaint and to stand to and abide by such orders, directions and decrees as to your Honors shall seem meet and in accordance with equity and good conscience. [7]

And your orator will ever pray, etc.

SEARCHLIGHT HORN COMPANY,

Complainant.

[Seal Searchlight Horn Company.]

By WILLIAM H. LOCKE, Jr.,

President.

CHARLES P. BOGART,

Secretary.

JOHN H. MILLER and

WM. K. WHITE,

Solicitor and of Counsel for Complainant,

Crocker Bldg., San Francisco, Cal.

United States of America,

Southern District of New York,

City and County of New York,—ss.

William H. Locke, Jr., being duly sworn, deposes and says that he is President of Searchlight Horn Company, complainant in the within entitled action; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true.

WILLIAM H. LOCKE, Jr.

Subscribed and sworn to before me this 6th day of November, 1912.

[Seal]

WILLIAM R. RUST,

Notary Public Kings County.

Certificate filed in New York County. [8]

No. 12,078.

State of New York,
County of New York,—ss.

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, DO HEREBY CERTIFY, That William R. Rust has filed in the Clerk's Office of the County of New York, a certified copy of his appointment and qualification as Notary Public for the County of Kings with his autograph signature, and was at the time of taking the annexed deposition duly authorized to take the same, and that I am well acquainted with the handwriting of said Notary Public, and believe that the signature to the annexed certificate is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County the 6 day of Nov., 1912.

[Seal]

WM. F. SCHNEIDER,

Clerk.

[Endorsed]: Filed Nov. 25, 1912. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [9]

*In the District Court of the United States for the
Northern District of California, Second Division.*

SEARCHLIGHT HORN COMPANY,

Complainant,

vs.

SHERMAN CLAY & COMPANY,

Defendant.

Notice of Motion for Preliminary Injunction.

To Sherman Clay & Company:

You are hereby notified that on Monday, December 9, A. D. 1912, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, complainant in the above-entitled action will move the said Court at the courtroom thereof in the Postoffice Building, at the City and County of San Francisco, State of California, for an order granting to complainant a preliminary injunction enjoining and restraining you until the final hearing of the case from making, using or selling or offering for sale any phonographic horn which infringes upon claims 2 or 3 of United States letters patent No. 771,441, issued October 4, 1904, to Peter C. Nielsen, which said patent is now owned by complainant.

Upon the hearing of this motion complainant will rely upon the papers and pleadings, together with the exhibits and testimony on file and of record in the action at law in this court, entitled Searchlight Horn Company against Sherman Clay & Company, No. 15,326, also the verified bill of complaint on file in this case and the affidavits of William H. Locke, Jr., and Hubert G. Prost (copies of which are herewith served upon you), together [10] with the trade catalogue referred to in the affidavit of Hubert G. Prost, which complainant has heretofore filed with the Clerk of the Court.

The ground of the above motion is that claims 2 and 3 of said patent have heretofore been sustained and held valid in the aforesaid action at law by this

same complainant against you in the above-entitled court, and that the issuance of a preliminary injunction is necessary and proper under the rules of practice of this court, and that unless the same is granted, complainant will suffer great and irreparable injury for which there is no plain, speedy or adequate remedy at law.

Dated this 23d day of November, 1912.

Yours, etc.,

MILLER & WHITE,

Attorneys for Complainant, Crocker Building, San Francisco. [11]

In the District Court of the United States for the Northern District of California, Second Division.

SEARCHLIGHT HORN COMPANY,

Complainant,

vs.

SHERMAN CLAY & COMPANY,

Defendant.

Affidavit of William H. Locke, Jr.

State of New York,

City and County of New York,—ss.

William H. Locke, Jr., being duly sworn deposes and says: This affidavit is made for use on behalf of complainant in a motion for preliminary injunction to be made in a suit having the above title shortly to be commenced in the District Court of the United States for the Northern District of California, Second Division.

I am the president of the Searchlight Horn Company, the owner of the Nielsen patent, No. 771,441, involved in the proposed suit, and for infringement of which said suit is to be brought.

In the early stages of the horn business and prior to 1907, the horns for phonographs were not a part of the equipment of the Phonograph Companies, but were made by different manufacturers of horns. The phonograph companies sold the phonographs and the horn companies sold the horns. In 1907 the phonograph companies made the horn a part of their equipment and from that time on sold the horn with the phonograph, thereby making it unprofitable for the individual horn manufacturers to continue in business as theretofore. In this way the sale of [12] horns became a monopoly with the phonograph companies, and the Searchlight Horn Company could no longer continue its business at a profit as theretofore. The Victor Talking Machine Co. did not purchase any horns from the Searchlight Horn Company but procured its horns to be made for them by other manufacturers, principally the Tea Tray Company, of Newark, N. J., without the license or authority of complainant. This forced the Searchlight Horn Co. to discontinue the actual manufacture of horns, and in May, 1908, they made a business arrangement with the Standard Metal Manufacturing Co. of Newark, N. J., to make and sell the Searchlight Folding Horn on a division of the profits resulting therefrom. If an injunction is granted herein against the defendant prohibiting further sale of infringing horns, the Victor Talking

Machine Co. will be compelled to secure its horns from complainant or someone authorized by complainant to manufacture same under the Nielsen patent. In such event the complainant would be willing to supply or cause to be supplied to the Victor Talking Machine Company horns made under the Nielsen patent for a reasonable consideration, whereby the Victor Talking Machine Co. would be enabled to continue to sell horns with its phonographs without interference with or cessation of its business, or any great damage thereto.

I am informed that Sherman Clay & Company is the Pacific Coast distributing agent for the Victor Talking Machine Co. and sell only such phonographs as are supplied to them and manufactured by the said Victor Talking Machine Co., and consequently the infringing machines marketed by Sherman Clay & Co. are all obtained from the Victor Talking Machine Co., and the Victor Talking Machine Company obtains them from manufacturers, who have no license under the Nielsen patent.

I was in San Francisco up to October 5th, 1912, and attended the trial of the action at law brought by the Searchlight Horn [13] Company against Sherman Clay & Co. in the above-entitled court, which resulted in a verdict for the plaintiff. I have been informed and I believe that since the commencement of that action at law, and even since the rendition of the verdict therein, Sherman Clay & Co. have continued to sell and offer for sale the identical form and style of phonograph horn which was held by the jury in said action at law to be an infringement

of the Nielsen patent, all without the license or consent of the Searchlight Horn Company. If the defendant is allowed to continue the said infringing acts, the Searchlight Horn Company will be subjected to great and irreparable injury for which, in my opinion, there is no plain, speedy or adequate remedy at law, and that a preliminary injunction will be the only adequate protection which the Searchlight Horn Company could obtain. The Nielsen patent expires on April 14, 1921, and I am informed that in the ordinary course of events attending the trial of equity cases, it will not be likely that this equity case above entitled could be disposed of in the lower court by a final decree before the expiration of several years, and that even then the defendant would be entitled to appeal to the Court of Appeals from any adverse judgment which would further postpone the time when complainant could obtain a definite remedy by injunction, whereas if a preliminary injunction is granted in this case, defendant would be compelled either to cease its infringement and leave the market to the complainant or else would be compelled to obtain its horns either from the complainant or some one authorized by complainant to manufacture under the Nielsen patent. There is not at the present time, nor has there ever been, any fixed established royalty for the manufacture and sale of the device covered by the Nielsen patent. The only license agreement complainant has ever entered into has been the business arrangement with the Standard Metal Manufacturing Company, hereinabove referred to, relating to the sale of folding

horns on a division of the profits. In justice and equity [14] I believe that Searchlight Horn Company is entitled to a preliminary injunction. In case such injunction be granted, the Searchlight Horn Company will be willing and able to supply the market with the Nielsen patented horn by causing the same to be manufactured by responsible manufacturers and to be sold to phonograph companies or any other person desiring the same throughout the United States.

WILLIAM H. LOCKE, Jr.

Subscribed and sworn to before me this 6th day of November, 1912.

[Seal]

WILLIAM R. RUST,

Notary Public, Kings County.

Certificate filed in New York County.

No. 12,079.

State of New York,
County of New York,—ss.

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, DO HEREBY CERTIFY, That William R. Rust has filed in the Clerk's Office of the County of New York, a certified copy of his appointment and qualification as Notary Public for the County of Kings with his autograph signature, and was at the time of taking the annexed deposition duly authorized to take the same, and that I am well acquainted with the handwriting of said Notary Public, and believe that the signature to the annexed certificate is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 6 day of Nov., 1912.

[Seal]

WM. F. SCHNEIDER,

Clerk. [15]

*In the District Court of the United States for the
Northern District of California, Second Division.*

SEARCHLIGHT HORN COMPANY,

Complainant,

vs.

SHERMAN CLAY & COMPANY,

Defendant.

Affidavit of Hubert G. Prost.

State of California,

City and County of San Francisco,—ss.

Hubert G. Prost, being duly sworn, deposes and says that since the rendition of the verdict and the entry of the judgment in the case of the Searchlight Horn Company vs. Sherman Clay & Company, No. 15,326, in the above-entitled court, wherein judgment was rendered in favor of plaintiff therein and against the defendant for \$3,578.00, I called at the store of Sherman Clay & Company at San Francisco, California, at the request of complainant's counsel, for the purpose of ascertaining if the defendant was still selling or offering for sale phonographic horns of the same style and manufacture as those involved in the aforesaid action at law, and I there saw on

exhibition for sale in the store of said Sherman Clay & Company a Victor Phonograph to which was attached a phonograph horn of the same style, character and manufacture as the horns involved in the aforesaid action at law and for which judgment was rendered. On that occasion the employee of defendant, who had the matter in charge, offered to sell horns of that kind and at the same time delivered to me a printed pamphlet or trade catalogue showing the different styles of horns and phonographs then on sale and being offered for sale [16] by Sherman Clay & Company; said catalogue shows on page 30 the list of prices for the so-called Flower horns which are the horns that were involved in the said action at law, and also shows at other pages in the catalogue cuts of said horns showing their style and form. I herewith deliver to complainant's counsel for filing with the Clerk of the Court the aforesaid trade catalogue, and I make this affidavit to be used on motion for a preliminary injunction in this suit in the above-entitled court shortly to be commenced and having the above title, being Searchlight Horn Company vs. Sherman Clay & Company.

HUBERT G. PROST.

Subscribed and sworn to before me this 22d day of November, 1912.

[Seal] GENEVIEVE S. DONELIN,
Notary Public in and for the City and County of San
Francisco, State of California.

[Endorsed]: Filed Nov. 25, 1912. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [17]

Subpoena ad Respondendum.

UNITED STATES OF AMERICA.

*District Court of the United States, Northern District of California, Second Division.***IN EQUITY.**

The President of the United States of America,
Greeting: To Sherman Clay & Company, a
Corporation Duly Organized and Existing Under and by Virtue of the Laws of the State of California.

YOU ARE HEREBY COMMANDED, That you be and appear in said District Court of the United States, Second Division, aforesaid, at the courtroom in San Francisco, on the 6th day of January A. D. 1913, to answer a Bill of Complaint exhibited against you in said court by SEARCHLIGHT HORN COMPANY, a corporation created and existing under and by virtue of the laws of the State of New York, and having its principal place of business in the city of New York, State of New York, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of FIVE THOUSAND DOLLARS.

WITNESS, The Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 25th day of November, in the year of our Lord one thousand

nine hundred and twelve and of our Independence the 137th.

[Seal]

W. B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [18]

MEMORANDUM PURSUANT TO RULE 12,
RULES OF PRACTICE FOR THE COURTS
OF EQUITY OF THE UNITED STATES.

YOU ARE HEREBY REQUIRED to enter your appearance in the above suit, on or before the first Monday of January next, at the Clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken *pro confesso*.

W. B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

RETURN ON SERVICE OF WRIT.

United States of America,

Northern District of California,—ss.

I hereby certify and return that I served the annexed Subpoena Ad Respondendum on the therein named Sherman Clay & Company, a corporation, by handing to and leaving an attested copy thereof, together with Bill of complaint attached thereto, on Leander S. Sherman, President of the Sherman Clay & Company, a corporation, personally, at San

Francisco, in said District, on the 25th day of November, 1912.

C. T. ELLIOTT,

U. S. Marshal.

By Paul J. Arnerich,

Deputy.

[Endorsed]: Filed Dec. 2, 1912. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [19]

*District Court of the United States, in and for the
Northern District of California, Second Division.*

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

SHERMAN CLAY & COMPANY,

Defendant.

**Answer of Sherman Clay & Co. to the Bill of
Complaint.**

This defendant, reserving all manner of exceptions that may be had to the uncertainty and imperfection of the Bill of Complaint herein, comes now and answers thereto or to so much thereof as it is advised is material to be answered, and says:

I.

Respondent denies that on or prior to April 14, 1904, or at any other time, or at all, one Peter C. Neilsen, mentioned in the Bill of Complaint herein, was the original and first inventor, or the original or first inventor, of certain improvements in horns for phonographs or similar machines. Denies that

the said improvements mentioned in said Bill of Complaint were new and useful or new or useful inventions, and denies that the same were not known to or used by others in this country, and denies that they were not patented or described in any printed publication in this or any foreign country before the said alleged invention thereof by the said Neilsen, and denies that the same were not known or described in any printed publication in this or any foreign country more than 2 years prior to the said alleged application of said Neilsen for a patent therefor, and denies that the same was not in public use or on sale in this country for more [20] than 2 years prior to the said application for said alleged patent.

II.

Respondent admits that a patent for an improvement for horns for phonographs and other similar instruments was issued to the said Neilsen as alleged in paragraphs 3 and 4 of the said Bill of Complaint.

III.

Respondent denies upon its information and belief that the complainant herein is now or ever was the owner of said letters patent.

IV.

Answering paragraph 6 of said Bill of Complaint, defendant avers that it has no information or knowledge sufficient to enable it to make answer thereunto, and upon all and each of the matters contained in said paragraph 6 the complainant is required to make due and competent proof.

V.

Answering paragraph 8 of said Bill of Complaint

respondent denies that within 6 years last past or since, or at any time or at all, it ever used or sold, or that it is now using or selling, any horns for phonographs containing and embracing the invention described and claimed and patented in and by said letters patent, or any or either of the claims thereof. Denies that any of the horns for phonographs ever used or sold by this respondent were made according to the specification of the said letters patent No. 771,441, and denies that any horns used or sold by this respondent embrace or embraced the invention therein described, claimed or patented, and denies that any such horns ever used by the said respondent were infringements upon claims 2 or 3 of said letters patent.

VI.

Answering paragraph 9 of said Bill of Complaint, respondent [21] denies that since the trial of the case mentioned in the Bill of Complaint that it has ever threatened or that it intends to continue to use or sell any of said horns until the final determination of this case.

VII.

Answering paragraph 10 of said Bill of Complaint, respondent avers that it has no knowledge or information sufficient to enable it to make answer thereto, and hereby requires competent proof thereof by the complainant.

VIII.

Answering paragraph 11 of said Bill of Complaint, defendant denies that the complainant will suffer great loss, or any loss or damage, by reason of the refusal of the Court to grant an injunction

herein, or by reason of any wrongs or injuries committed by this defendant, and defendant avers that complainant has a plain, speedy and adequate remedy at law to recover any royalties or damage that might accrue to it by reason of any infringement of said patent by this defendant.

IX.

Respondent further avers as a separate and special defense to this action that the said complainant and its predecessors in interest were and are guilty of laches, and are estopped from the prosecution of this action in equity for the reasons hereinafter stated, to wit: That said complainant and its predecessors, both as individuals and corporations, resided and had their places of business in and about the city of New York in the State of New York; that the Victor Talking Machine Company is a corporation organized and existing under the laws of the State of New Jersey, and has and has had its principal place of business at Camden, New Jersey, during all the times herein stated; that the Tea Tray Company is also a corporation organized and existing under the laws of the [22] State of New Jersey and has its principal place of business at Newark, New Jersey; that the Edison Phonograph Company is also a corporation organized and existing under the laws of the State of New Jersey, and has had and now has its principal place of business at Orange, New Jersey; that the American Graphophone Company is also a corporation organized and existing under the laws of the State of West Virginia, and has its principal place of business at

Bridgeport, Conn.; that the Columbia Phonograph Company is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and has its principal place of business at New York City, New York; and defendant further avers that all of said corporations and others during all the times since the year 1904, or thereabouts, have been actively engaged in the manufacture, use, sale and public distribution of the style and class of horns used and sold by this defendant and which are claimed to be infringements of said patent; that they so made, sold and distributed the same to many wholesale and retail dealers throughout the United States; that the said manufacture, use and sale, and the distribution thereof to corporations and individuals and to wholesale and retail dealers in the immediate neighborhood and adjacent cities, towns and territory of the main office of the said complainant has been public, general and notorious, and that said complainant and its predecessors have during all of said time had full knowledge of such manufacture, use, sale and distribution of said devices by the entire trade engaged in that line of business.

Defendant further avers that it purchased said goods from the Victor Talking Machine Company, and that it did so purchase and sell the same in perfect good faith, and at all times ignorant that it was contended or claimed by the complainant or any of its predecessors that the horns sold by the Victor Talking Machine Company and others hereinbefore mentioned were infringements [23] of the said Neilsen patent or in violation of any rights or privileges owned or claimed by the complainant herein.

Defendant further avers that it never had any knowledge or any reason to suppose that the buying, selling or using of the devices heretofore sold by it were infringements upon any rights of the complainant herein up to the time herein stated.

Defendant further avers that by reason of the said acts of said complainant and its predecessors in interest in permitting the public in general to manufacture, sell, distribute and use such horns, with its personal knowledge and consent, not only in its immediate neighborhood but throughout the entire country, this respondent was and has been greatly misled, and by the said acts of said complainant was led to suppose, and did suppose, that defendant and all other persons had a perfect legal right to manufacture, buy, sell and use said phonographic horns.

Defendant further avers that for a period of more than 8 years last past the complainant has constantly, continuously and willfully disregarded and ignored any exclusive rights that it might have, or that may have been conferred upon it by the said Neilsen and his predecessors in interest by virtue of said patent, and have knowingly and willfully, and for the purpose, as defendant is informed and believes, of silently permitting and allowing the public to become involved in extensive infringements of said patent for the purpose of ultimately collecting large royalties and damages by reason of its stale claims for the infringements of said patent.

Defendant further avers that it is informed and believes, and so stated the fact to be, that this court, sitting as a court of equity, should not now exercise

jurisdiction to enforce by equitable proceedings any rights that the complainant may have or [24] might have had for the alleged infringement of said patent had they pressed their claims within a reasonable time, and that said complainant is guilty of great laches and inequitable conduct, in so delaying the enforcement of their rights, and is now estopped from maintaining suits on the equity side of this court for injunctions against, and accountings from the alleged infringers.

X.

For a further and special defense to said action, the said defendant hereby gives notice that under and pursuant to the provisions of Section 4920 of the Revised Statutes of the United States, the defendant above named will upon the trial of the above-entitled action prove and offer evidence tending to prove the following special matters, as a defense to said action, to wit:

That the horn for phonographs or similar machines patented by said Peter C. Neilsen, No. 771,441, dated October 4, 1904, mentioned in the declaration herein and sued on in this action, had been patented, fully shown, indicated and described prior to the alleged invention or discovery thereof by the said Peter C. Neilsen, in the following letters patent of the United States and foreign countries; and the names of the patentees of said letters patent and the dates of said patents and when granted are here given, to wit:

No. 8824, dated and granted Dec. 7, 1857, to Frederick S. Shirley, for an improved Design for Glass-ware.

No. 10,235, dated and granted Sept. 11, 1877, to Edward Cairns, for improved Design for Speaking-Trumpets.

No. 34,907, dated and granted Aug. 6, 1901, to Charles McVeet and John F. Ford, for an improved Design for a Ship's Ventilator. [25]

No. 72,422, dated and granted Dec. 17, 1867, to George S. Saxton, for improvements in Manufacture of Corrugated Bells.

No. 165,912, dated and granted July 27, 1875, to William H. Barnard, for improvements in Lamp-Chimneys.

No. 181,159, dated and granted Aug. 15, 1876, to Charles W. Fallows, for improvement in Toy Blow-Horns.

No. 187,589, dated and granted Feb. 20, 1877, to Emil Boesch for improvement in Reflectors.

No. 216,188, dated and granted June 3, 1879, to Thomas W. Irwin and George K. Reber, for improvement in Water-Conductors.

No. 240,038, dated and granted April 12, 1881, to Nathaniel C. Powelson and Charles Deavs, for improved Reflector.

No. 274,930, dated and granted April 3, 1883, to Isaac P. Frink, for improved Reflector for Chandeliers, etc.

No. 276,251, dated and granted April 24, 1883, to Philip Lesson, for improved Child's Rattle.

No. 337,972, dated and granted Mar. 16, 1886, to Henry McLaughlin, for improved Automatic Signal-Buoy.

No. 406,332, dated and granted July 2, 1889, to

James C. Bayles for improved Pipe or Tube.

No. 409,196, dated and granted Aug. 20, 1889, to Charles L. Hart, for improved Sheet-Metal Pipe.

No. 427,685, dated and granted May 13, 1890, to James C. Bayles for improved Pipe-Section.

No. 455,910, dated and granted July 14, 1891, to William J. Gordon, for improved Sheet-Metal Elbow or Shoe.

No. 612,639, dated and granted Oct. 18, 1898, to James Clayton, for improved Audiphone.

No. 648,994, dated and granted May 8, 1900, to Major D. Porter, for improved Collapsible Acoustic Horn.

No. 651,368, dated and granted June 12, 1900, to John Lanz, for improved Composite Metal Beam or Column. [26]

No. 699,928, dated and granted May 13, 1902, to Charles McVeety and John F. Ford, for improved Ship's Ventilator.

No. 705,126, dated and granted July 22, 1902, to George Osten and William P. Spalding, for improved Horn for Sound Recording and Reproducing Apparatus.

No. 738,342, dated and granted Sept. 8, 1903, to Albert S. Marten, for improved Interchangeable Sound-Amplifying Means for Talking or Sound-Reproducing Machines.

No. 739,954, dated and granted Sept. 29, 1903, to Gustave Herman Villy, for Horn for Phonographs, Ear-Trumpets, etc.

British Letters Patent No. 7594, dated and granted April 24, 1900, to William Phillips Thompson for im-

provements in Graphophones or Phonographs.

British Letters Patent No. 17,786, dated and granted August 13, 1902, to Henry Fairbrother for improvements in Phonographs and other Talking Machines.

British Letters Patent No. 20,567, dated and granted Sept. 20, 1902, to John Mesny Tourtel for improvements in Phonographs.

That prior to the year 1894 devices fully showing and describing and indicating the alleged invention patented by the said Peter C. Neilsen, No. 771,441, dated October 4, 1904, mentioned in the declaration herein and sued in this action, has been manufactured, sold and placed into use in this country, and were known to others in this country long prior to the alleged invention and discovery thereof by the said Peter C. Neilsen, the same having been manufactured, sold, placed into use and known to the following named persons, to wit:

Manufactured and sold as early as the year 1893 by the Tea Tray Company, now located at the corner of Murray and Mulberry Streets, Newark, New Jersey.

Manufactured and sold prior to the year 1896 by the firm of Noble and Brady, located and doing business in New Britain, [27] Connecticut.

That the manufacture and use of such devices was known to John H. B. Conger, residing at #26 Van Ness Place, Newark, New Jersey; George C. Magill, residing at #31½ South 12th Street, Newark, New Jersey; Charles J. Eichhorn, whose address is corner Murray and Mulberry Streets, Newark, New

Jersey; Peter Shooppler, residing at #48 N. Arlington Avenue, East Orange, New Jersey; Thomas H. Brady, residing at #124 Washington Street, New Britain, Conn.; William J. Noble, residing at #109 Section Street, New Britain, Conn.; August Doig, residing at #26 South High Street, New Britain, Conn.; James Connelly, residing at #164 Beaver Street, New Britain, Conn.; and that the devices manufactured and sold and known to the above-mentioned parties were used by the New Jersey Phonograph Company, whose place of business was at the corner of Orange and Plain Streets, in the City of Newark, New Jersey; North American Phonograph Company of #30 Park Place, New York City, New York, and by others whose names, addresses and places of business are unknown at this time, but when ascertained this defendant craves leave to incorporate in the notice herein given as to manufacture, sale, use and knowledge of the alleged invention contained in the letters patent in suit.

WHEREFORE defendant prays that the motion for a preliminary injunction herein be denied, and that the Bill of Complaint be dismissed for want of equity.

N. A. ACKER,

J. J. SCRIVNER,

Sol. and Attorneys for Defendant.

N. A. ACKER,

J. J. SCRIVNER,

Of Counsel. [28]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Ferdinand W. Stephenson, being first duly sworn, deposes and says: That he is an officer, to wit, Secretary of the Sherman Clay & Company, a corporation, the defendant named in the foregoing Answer; that he has read the said Answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated on information and belief, and that as to those matters he believes it to be true.

FERDINAND W. STEPHENSON.

[Corporate Seal Sherman & Clay Company.]

Subscribed and sworn to before me this 31st day of December, 1912.

[Seal]

A. K. DAGGETT,

Notary Public in and for the City and County of San Francisco, State of California.

Due service and receipt of a copy of the within Ans. is hereby admitted this 2d day of January, 1913.

MILLER & WHITE,

Attorneys.

[Endorsed]: Filed Jan. 4, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [29]

*District Court of the United States, in and for the
Northern District of California, Second Di-
vision.*

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

SHERMAN CLAY & COMPANY,

Defendant.

Affidavit of Andrew G. McCarthy.

State of California,

City and County of San Francisco,—ss.

Andrew G. McCarthy, being first duly sworn, deposes and says: That during all the times herein-after mentioned he was and is one of the managing directors of the corporation defendant, and has sole charge of the Talking Machine Department of the business of said defendant; that he was at all times heretofore and is now familiar with all the business of said firm connected with that department; that he has read the Bill of Complaint and affidavits of William H. Locke, Jr., and Herbert G. Prost, filed herein for the purpose of obtaining a preliminary injunction in this cause.

Affiant further says that immediately after the entry of the judgment in the case of the Searchlight Horn Company vs. Sherman Clay & Company, No. 15,326, the same being an action at law tried in this court, he gave instructions to the employees of said Company in its place of business in San Francisco, California, directing them not to sell or offer for sale

any of the horns which were claimed at said trial to be infringements of the said Neilsen Patent involved in said action and in this suit. [30]

Affiant states that since the entry of said judgment, to wit, on the 4th day of October, 1912, the wholesale department of the said defendant has sold at wholesale, approximately thirty of said horns, but otherwise no horns have been sold by the said defendant, which was claimed in said action to be infringements of said patent, and affiant, upon his information and belief, denies that any employee in the retail department of said defendant corporation has since said date offered for sale said horns or any of them, or any similar horn, as alleged and stated in the affidavit of said Prost.

Affiant further says that the horns which it has heretofore offered for sale and placed on the market are horns supplied to the defendant company with talking machines which the said company purchased from the Victor Talking Machine Company, a corporation located and doing business at Camden, New Jersey, and on his information and belief affiant states that the Victor Talking Machine Company has been marketing, selling and offering for sale horns of the same character in connection with the talking machine goods ever since the year 1904, and has largely distributed the said goods and horns throughout the United States to dealers handling such class of goods, the Victor Talking Machine Company being the largest manufacturer and seller of talking machines in this country.

Affiant further says that this motion should not be

granted and an injunction issued, for the reason that said complainant and its predecessors in interest, both as individuals and corporations, have during all the period of time since the issuance of the Neilsen Patent in suit been residents and engaged in business in and about the city of New York and nearby places; that the Victor Talking Machine Company is a corporation organized and existing under the laws of the State of New Jersey and has its principal place of business at Camden, New Jersey, which is in [31] close proximity to the city of New York; that the Tea Tray Company is also a corporation organized and existing under the laws of the State of New Jersey, and has its principal place of business at Newark, New Jersey, which is also a near-by city, and that the Tea Tray Company has been for a long number of years engaged in the manufacture of horns for talking machine companies, and has made during all of said time horns of the type involved in the patent in suit; that the Edison Phonograph Company is a corporation organized and existing under the laws of the State of New Jersey and has its principal place of business at Orange, New Jersey, and that the said Edison Phonograph Company is a large manufacturer and dispenser of talking machines, and in connection with said machines employs horns of the type and kind embodied in the patent in suit, and for a long number of years, to wit, since the year 1904, affiant is advised that the said Edison Phonograph Company has been placing on the market phonographs equipped with such horns; that the American Graph-

ophone Company is a corporation organized and doing business under and by virtue of the laws of the State of West Virginia, and has its principal place of business at Bridgeport, Conn., and that the said American Graphophone Company is a large manufacturer and dispenser of talking machines, and in connection with the said machines employs horns of the type of the horn of the patent in suit; also that the Columbia Phonograph Company is a seller to a large extent of talking machines which are equipped with horns of the type involved in the present controversy and that said company has been placing such machines so equipped with horns on the market since about the year 1904 or 5, and has largely distributed these goods equally with the other manufacturers above mentioned to a large number of dealers throughout the United States, the Columbia Phonograph Company being a corporation located and doing business in territory adjacent to that in which the Victor Talking [32] Machine Company, the American Graphophone Company and the Edison Phonograph Company are located and doing business, all of said companies having their places of business adjacent to the city of New York.

Affiant further says that all of said companies have been distributing their said goods throughout the United States to wholesale and retail distributors with the full knowledge, consent and approval of the plaintiff and its predecessors in interest; that affiant is informed and believes, and so states the fact to be, that in no instance until about the time of the commencement of the action before referred to, No.

15,326, did complainant and its predecessors in interest ever take any legal steps to enforce any contention that the class of horns sold by this defendant were infringements of the said Neilsen patent in suit, but, on the contrary, by reason of the extensive use and sale of these horns throughout the United States to all dealers generally, the defendant herein believed, and had every reason to believe, that the company supplying it with talking machines and horns had every right under the law to justify the disposal of the said goods.

Affiant further says that by reason of the said acts of said complainant and its predecessors in interest permitting the public in general to manufacture and sell said horns at points near by and within the immediate neighborhood and jurisdiction of the said complainant, this respondent was and has been misled and supposed that it had a perfect right to buy and sell said machines equipped with such horns, and they had no knowledge that prior to about the time of the commencement of the said law case mentioned in the Bill of Complaint herein that it was claimed by the complainant that the said horns then being purchased by defendant of the said Victor Talking Machine Company were infringements of said patent, and that all of said horns purchased and sold by this defendant were purchased and sold in perfect good [33] faith, and in ignorance that they were violating any rights claimed by the said complainant or its predecessors.

Affiant further avers that the said complainant and its predecessors have for more than 8 years last past

constantly and continuously disregarded any exclusive right that might have been conferred upon the said Neilsen or its successors in interest by virtue of said patent, they having at all times as above stated full knowledge of the manufacture, sale and distribution of said horns throughout the United States by numerous dealers in the talking machine trade, and that by reason of the said dilatoriness on the part of the complainant and its predecessors in interest they are guilty of laches, and are estopped from obtaining any equitable relief in said action, and by reason of such negligence this Court should not take equitable jurisdiction of this case, and especially this Court should not at this time grant any preliminary injunction which would preclude the defendant at this time from disposing of such goods as it may have on hand and which were purchased in good faith, and more especially so in view of the fact that the defendant is perfectly able to respond in any damages which might accrue by reason of any action brought for the recovery of damages, and that the granting of a preliminary injunction at this time would work a greater hardship on the defendant than the refusal thereof would work on the plaintiff.

Affiant further avers that owing to the fact that the complainant is entirely cognizant that the defendant is fully able to respond in any damages that might hereafter be obtained for any alleged infringement of said patent, that this motion is not made in good faith, but made for the purpose, as affiant is informed and believes, of compelling this defendant to compromise and settle the suit referred to

in the complaint herein, wherein a judgment was entered for \$3,750, and to harass and embarrass the [34] defendant in the *same* of its talking machine goods, and to publish the same broadly, and on the strength thereof compel other innocent dealers to pay tribute or compromise for alleged claims of infringement before any final adjudication of the present action.

Affiant further says that there has been no final adjudication at this time of the above-mentioned law action, No. 15,326, where a judgment was entered against the defendant company, but, on the contrary, there is now pending in this court a motion for a new trial, and that it is the intent of the defendant company to prosecute said case to a final determination in the Circuit Court of Appeals in case the motion for a new trial is denied, and until such final adjudication of the said action no preliminary injunction should be granted, the granting of which at this time would seriously interfere with the business of the defendant corporation.

Affiant further says that the granting of this motion would in no manner inure to the substantial benefit of the plaintiff, as in any event it could have but a very limited scope, and the defendant being entirely responsible as aforesaid for any royalties or damages that might accrue there is no necessity or justification for the granting of the motion at this time.

ANDREW G. McCARTHY.

Subscribed and sworn to before me this 31st day of December, 1912.

[Seal]

A. K. DAGGETT,

Notary Public in and for the City and County of San Francisco, State of California. [35]

Service of the within affidavit of A. G. McCarthy admitted this 2 day of January, 1913.

MILLER & WHITE,

Solicitors for Complainant.

[Endorsed]: Filed Jan. 4, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [36]

District Court of the United States, in and for the Northern District of California, Second Division.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

SHERMAN CLAY & COMPANY,

Defendant.

Affidavit of William F. Morton.

State of California,

City and County of San Francisco,—ss.

William F. Morton, being first duly sworn, deposes and says: That during all the times hereinafter mentioned *has was* and is the head salesman of the retail talking machine department of the corporation defendant herein, and as such has charge and supervision of the sales and stock of talking machines and accessories thereof handled by the defendant corpora-

tion; that he is under the supervision of Mr. Andrew J. McCarthy, who is the managing director of the corporation defendant; that on or about the 4th day of October, 1912, he was given instructions by the said Andrew G. McCarthy not to dispose or offer for sale any of the phonographic horns which the corporation defendant then had on hand, the said horns being what were commonly known as flowered horns, and the horn involved in *section* at law No. 15,326, entitled Searchlight Horn Company vs. Sherman Clay & Company; that in accordance with the instructions received from Andrew G. McCarthy he personally notified each of the clerks in his department not to sell or offer for sale any of such horns until further advised either by affiant or by Andrew G. [37] McCarthy; that to affiant's best knowledge and belief no such horns have at any time been sold by the defendant corporation since on or about the 4th day of October, 1912; that he has interviewed each salesman in the talking machine department of the defendant corporation for the purpose of ascertaining whether any such horns had been sold since the instructions issued for the nonsale thereof, and has been advised by each of the clerks that no such horns have been sold since the instructions heretofore mentioned were given.

That no such horns could have been sold without the sale thereof having been brought to the attention of either affiant or of the said Andrew G. McCarthy; that he has read the affidavit of Herbert G. Prost, given on behalf of the Searchlight Horn Company in connection with Equity Suit No. 15,623, entitled

Searchlight Horn Company vs. Sherman Clay & Company, in connection with which suit affiant is informed that motion has been made for a Preliminary Injunction, the said affidavit having been given for the purpose of obtaining, as he understands, a Preliminary Injunction in this cause.

That affiant, on information and belief, states that the horns sold by Sherman Clay & Company in connection with its talking machines, prior to the 4th day of October, 1912, were horns supplied to the defendant corporation by the Victor Talking Machine Company in connection with talking machines purchased from said company; that affiant does not believe that any horn supplied by the Victor Talking Machine Company to the defendant corporation was ever offered for sale to the said Herbert G. Prost, and does not believe that the said Prost saw talking machines exhibited for sale in the sales room of the defendant corporation equipped with horns referred to in the said affidavit, for the reason that all such horns were removed from the talking machine department and stored away in the basement of the defendant corporation on the instructions being given by Andrew G. McCarthy not [38] to sell any of such horns; that about the time that the said Herbert G. Prost visited the sales department of the defendant corporation, as set forth in his affidavit, there was on the floor of the sales department a Columbia machine equipped with a horn somewhat similar to the horn sold with the Victor Talking Machine, and affiant believes that the said Prost took such horn to be one of the horns heretofore sold by the defendant

corporation prior to October 4/'12; that such machine was a second-hand talking machine, the same having been received by the defendant corporation as part payment in connection with the sale of a Victor Talking Machine, and since the affidavit of Mr. Prost has been disposed of.

That he has every reason to believe that the said Herbert G. Prost received a catalogue illustrative of the various goods sold by the defendant corporation, which catalogue was doubtless asked for by the said Prost and given to him at his request; that said catalogue is one of the catalogues used by the defendant corporation for a long time, and such catalogue does illustrate horns of the flower type, as heretofore sold by the defendant corporation, no special catalogue being used by the defendant corporation for the horns; that had said Herbert G. Prost offered to purchase one of the horns referred to in his affidavit, the same would not have been sold to him under the instructions before referred to not to sell any of such horns, and affiant is satisfied that no clerk in connection with the sales department of the talking machines of the defendant corporation would have taken upon himself the responsibility of deliberately disobeying such orders; that the present affidavit is given on behalf of the defendant corporation for use on the hearing of the motion of the plaintiff corporation for a Preliminary [39] Injunction.

WILLIAM F. MORTON.

Subscribed and sworn to before me this 31st day of December, 1912.

[Seal]

A. K. DAGGETT,

Notary Public in and for the City and County of San Francisco, State of California.

Service of the within aff. admitted this 2d day of Jan., A. D. 1913.

MILLER & WHITE,

For Plffs.

[Endorsed]: Filed Jan. 4, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [40]

In the District Court of the United States for the Northern District of California, Second Division.

No. 15,623.

SEARCHLIGHT HORN COMPANY,

Complainant,

vs.

SHERMAN CLAY & COMPANY,

Defendant.

**Rebuttal Affidavit of William H. Locke, Jr., on
Behalf of Complainant on Motion for Preliminary Injunction.**

State of New York,
City and County of New York,—ss.

William H. Locke, Jr., being duly sworn, deposes and says:

I am the same William H. Locke, Jr., who has heretofore made an affidavit on behalf of complainant in the above-entitled suit, and am the president

of the complainant corporation.

I have read the affidavit of Andrew G. McCarthy, dated December 31, 1912, and filed herein on behalf of defendant in opposition to the motion for preliminary injunction. I note the statement therein on information and belief that ever since the year 1904 the Victor Talking Machine Co. has been marketing and selling horns of the character heretofore held to be an infringement of the Neilsen patent. I am acquainted with the facts in that regard and state that the Victor Talking Machine Co. first began to market, sell and offer for sale the aforesaid horns in 1906. I also note the statements in McCarthy's affidavit that the Tea Tray Company of New Jersey, the Edison Phonograph Company of New Jersey, the American [41] Graphophone Co. of Connecticut and the Columbia Phonograph Co. have been placing upon the market and selling talking machines and phonographs equipped with horns of the kind heretofore held to be an infringement of the Neilsen patent, and that all of said companies have been distributing their goods throughout the United States to wholesale and retail distributors with the full knowledge and consent of the plaintiff and its predecessors in interest, and that in no instance until about the time of the commencement of the action at law at San Francisco, No. 15,526, did complainant and its predecessors in interest ever take any legal steps to enforce any contention that the class of horns sold by defendant were infringements of the Neilsen patent, but that by reason of the extensive use and sale of these horns throughout the United States the de-

fendant believed, and had reason to believe, that the company supplying the same had every right under the law to justify the disposal of the said goods, and I note the further statement in said affidavit that the complainant and its predecessors have for more than eight years last past constantly and continuously disregarded any exclusive right that they might have in the said Neilsen patent, as they had at all of said times full knowledge of the manufacture, sale and distribution of said horns throughout the United States by numerous dealers and delayed to prosecute the same, and are guilty of laches and are estopped from now prosecuting the same in a suit in equity.

In regard to the foregoing statements, I aver that the same are not true, but are inaccurate in many particulars and are wholly untruthful in many others. On May 9, 1906, the Searchlight Horn Company, through its attorney, notified the Victor Talking Machine Co. formally and in writing that the horns marketed by them were an infringement upon the Neilsen patent, No. 771,441. In reply to that letter, the attorney for the Victor Talking [42] Machine Co. wrote to the Searchlight Company's attorney acknowledging receipt of same and promising to examine into the matter and report the result. In a similar manner the Searchlight Horn Company notified the Tea Tray Co. of Newark, N. J., the New Jersey Sheet Metal Company of Newark, N. J., and various and sundry other manufacturers and dealers in horns of that character, and in order to make assurance doubly sure, and for fear that some persons affected might not have been notified, in November,

1906, the Searchlight Horn Co. caused to be printed a circular notice, of which a copy is hereunto attached and marked Exhibit "A," and mailed said circulars generally and promiscuously to all persons they knew of who were engaged in the business of making, selling or dealing in phonograph horns or phonographic supplies throughout the United States, and affiant believes that amongst other persons to whom a copy of said circular was sent is Sherman Clay & Company, defendant herein.

The Searchlight Horn Company also at various times thereafter was in negotiation with the manufacturers and dealers in phonographic horns, including the Victor Talking Machine Co., looking towards a settlement of their differences and the taking over of the Neilsen patent and the other patents owned by the Searchlight Horn Company, at all of which times the Searchlight Horn Company asserted its rights to said patents and gave everyone to understand that infringers thereof would be prosecuted. In May, 1908, the Searchlight Horn Company was compelled to transfer its manufacturing business over to the Standard Metal Mfg. Co. of New Jersey.

The Searchlight Horn Company has at all times asserted its rights under said Neilsen patent and its intention to prosecute infringers, and has taken all means in its power to give publicity thereto, and all of the manufacturers and dealers in talking machines and especially the Victor Talking Machine Co. and the [43] Tea Tray Co. have been well aware of the Searchlight Horn Company's position in the matter.

The reason why suits were not brought before was because of lack of means on the part of the Searchlight Horn Company and their inability to secure the services of a proper and competent attorney to take charge of the litigation. In the spring of 1910, I secured the services of our present attorney and gave him instructions to proceed with all reasonable diligence in the prosecution of all infringers. He was required to do a great deal of preliminary work and investigation before suit could be filed, but I believe that he proceeded with reasonable diligence thereafter.

I note the further statement of Mr. McCarthy in his affidavit that this motion for preliminary injunction was not made in good faith, but for the purpose, as he is informed and believes, of compelling the defendant to compromise and settle the suit referred to wherein a judgment was entered for \$3,578, and to harass and embarrass the defendant, and to publish the same broadly, and to compel other innocent dealers to pay tribute. I deny these statements. They are not true. This motion is made in good faith. It is not made for the purpose of compelling the defendant to compromise and settle the aforesaid suit and pay the judgment, or to harrass and embarrass the defendant, etc. On the contrary, we do not desire the defendant to settle and compromise the aforesaid suit, or to pay the judgment therein at this time. We desire earnestly that the defendant shall by writ of error take said judgment to the Court of Appeals, to the end that there may be a final adjudication of the case by the Court of Appeals; of course,

we shall then endeavor to compel other infringers to make just compensation for their infringement. This motion is made in good faith and for the purpose of protecting the right of the complainant, and to ascertain if the complainant has a right to secure preliminary injunctions [44] against infringers of its patent. It is not intended that such injunctions, if granted, should be used in any improper manner, but only in the enforcement of the rights of complainant.

WILLIAM J. LOCKE, Jr.,

Subscribed and sworn to before me this 13th day of January, 1913.

[Seal]

LORENZ L. PRITZL,

Notary Public New York County. No. 107.

Certificate filed in Kings County, Kings County Register's No. 4969, New York County Register's No. 4096. Commission expires March 30, 1914.

No. 24,435.

State of New York,
County of New York,—ss.

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for the said county, the same being a Court of Record, DO HEREBY CERTIFY, That Lorenz L. Pritzl, before whom the annexed deposition was taken, was, at the time of taking the same, a Notary Public of New York, dwelling in said county, duly appointed and sworn, and authorized to administer oaths to be used in any court in said State, and for general purposes; that I am well acquainted with the handwrit-

ing of said Notary, and that his signature thereto is genuine, as I verily believe.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 13 day of Jan., 1913.

[Seal]

WM. F. SCHNEIDER,

Clerk. [45]

EXHIBIT "A."

SEARCHLIGHT HORN COMPANY
MANUFACTURERS OF
THE MARVELOUS SEARCHLIGHT
HORNS.

Telephone 2606 Bushwick.

753-755 Lexington Avenue,
Brooklyn, N. Y. November 15th, 1906.

Dear Sirs:—

Becoming alarmed at the rapidity with which our "SEARCHLIGHT HORNS" have gained the favor of the public, our competitors have in an unbusiness-like manner attempted to intimidate our customers.

We therefore notify you that the Searchlight horn is protected by United States Letters Patents No. 771,441, of October 4, 1904, and No. 12,442 of Jan. 30, 1906.

Among other claims, said patents contain the following: A phonograph horn or the like comprising a number of flexed strips having curved meeting edges and means joining said edges, said strips being so flexed and said edges so curved and joined that the horn is given a trumpet-like or bell-like form, the strips forming angles where said edges meet.

A horn for phonographs and similar instruments, said horn being larger at one end than at the other and tapered in the usual manner, said horn being composed of longitudinally arranged strips secured together at their edges and the outer side thereof at the points where said strips are secured together being provided with longitudinal ribs, substantially as shown and described.

All of the so-called "Flower Horns" made by our aforesaid competitors are flagrant infringements of said patents.

The "Searchlight Horn" is further protected by United [46] States patent No. 38,275 of October 9th, 1906; and other patents covering said horn will issue in due course.

If after the knowledge of these facts you consider it prudent to buy "Flower Horns" other than the "Searchlight," do not hold us blameworthy if trouble ensues, as we have been obliged to place the patents in the hands of our attorney with instructions to take steps to protect our rights thereunder; and remember, please, that we make the best horn in the market and sell it at a fair price.

Very truly yours,

SEARCHLIGHT HORN COMPANY.

Service of the within Affidavit of William H. Locke, Jr., admitted this 25th day of January, A. D. 1913.

N. A. ACKER,

Solicitor for Defendant.

[Endorsed]: Filed Jan'y 27, 1913. W. B. Maling,
Clerk. [47]

At a stated term, to wit, the March term, A. D. 1913, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 28th day of April, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,623.

SEARCHLIGHT HORN COMPANY

vs.

SHERMAN CLAY & COMPANY.

Order Granting Motion for Preliminary Injunction.

Complainant's motion for a preliminary injunction herein heretofore heard and submitted being now fully considered, and the Court having rendered its oral opinion thereon, it was ordered that said motion be and the same is hereby granted, and that a preliminary injunction issue accordingly. [48]

In the District Court of the United States for the Northern District of California, Second Division.

No. 15,623.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

SHERMAN CLAY AND COMPANY, a Corporation,
Defendant.

Writ of Injunction.

To Sherman Clay and Company, a Corporation, Its
Officers, Agents, Clerks, Attorneys, Servants
and Workmen, Greeting:

WHEREAS the above-named plaintiff has heretofore filed in this Court its bill of complaint alleging that on October 4, A. D. 1904, letters patent of the United States, No. 771,441, for an improvement in phonographic horns were issued to Peter C. Nielsen, and that said patent is now owned by plaintiff herein, and that you have heretofore infringed upon claims 2 and 3 of said letters patent by selling to others phonographic horns containing and embodying the invention set forth and claimed in said claims 2 and 3 of said letters patent contrary to the form, force and effect of the Statutes of the United States in such cases made and provided:

AND WHEREAS, the plaintiff has heretofore applied to this Court and made a motion in writing in due form asking for a preliminary injunction enjoining and restraining you until the final hearing of the case or the further order of the Court from continuing the said infringement, which said motion was supported by the verified bill of complaint and certain affidavits filed [49] on behalf of the plaintiff and was resisted by you, the defendant, by verified answer and certain affidavits filed by you in your behalf; and

WHEREAS, the said motion was heretofore duly and regularly heard and considered by the Court and an order made thereupon that said motion be

granted and that a preliminary injunction be issued in accordance therewith:

NOW, THEREFORE, we do hereby strictly command and enjoin that you, the said Sherman Clay and Company, a corporation created under the laws of the State of California, your officers, agents, clerks, attorneys, servants and workmen, and each of you, do forthwith and until the further order of the Court cease, desist and refrain from making, using or selling or offering for sale any horn or horns for phonographs either attached to and connected with, or separate or disconnected from any phonographs containing and embodying the invention described in said letters patent, No. 771,441, and claimed by claims 2 and 3 thereof, or either of them, as heretofore construed by the Court, which said claims read as follows:

2. A horn for phonographs and similar machines, the body portion of which is composed of longitudinally arranged strips of metal provided at their edges with longitudinal outwardly-directed flanges whereby said strips are connected and whereby the body portion of the horn is provided on the outside thereof with longitudinally-arranged ribs, said strips being tapered from one end of said horn to the other, substantially as shown and described.

3. A horn for phonographs and similar instruments, said horn being larger at one end than at the other and tapered in the usual manner, said horn being composed of longitudinally-arranged strips secured together at their edges

and the outer side thereof at the points where said strips are secured together being provided with longitudinal ribs, substantially as shown and described.

Which said commands and injunctions you and each of you are hereby respectively required to observe and obey until our said District Court shall make further orders in the premises. [50]

Hereof fail not under penalty of the law thence ensuing.

WITNESS the Honorable WILLIAM C. VAN FLEET, Judge of said District Court this 29th day of April, A. D. 1913, and the one hundred and thirty-seventh year of the Independence of the United States of America.

[Seal] Attest: WALTER B. MALING,
Clerk U. S. District Court, Northern District of California.

RETURN ON SERVICE OF WRIT.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Writ of Injunction on the therein named Sherman Clay & Company, a corporation, by handing to and leaving a true and correct copy thereof with Leander S. Sherman, who is the President of the Sherman Clay & Company (a Corp.), personally, at San Francisco, in said District, on the 29th day of April, 1913.

C. T. ELLIOTT,

U. S. Marshal.

By Paul J. Arnerich,

Deputy.

[Endorsed]: Filed May 5, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [51]

*In the United States District Court, in and for the
Northern District of California, Second Divi-
sion.*

IN EQUITY—No. 15,623.

SEARCHLIGHT HORN COMPANY,

Complainant,

vs.

SHERMAN-CLAY & COMPANY,

Defendant.

Petition for Order Allowing Appeal.

Sherman-Clay & Company, the above-named defendant, conceiving itself to be aggrieved by the interlocutory order made and entered in the above-entitled cause in the above-entitled court on the 29th day of April, 1913, wherein and whereby it was ordered and decreed that the defendant, pending the final hearing and decree herein, be enjoined from using, selling and offering for sale devices or inventions described and covered by United States letters patent No. 771,441, sued upon in said cause and described in complainant's Bill of Complaint, and by which interlocutory order complainant was awarded a preliminary injunction against the said defendant, hereby petitions said Court for an order allowing said defendant to prosecute an appeal from said interlocutory order granting said preliminary injunction to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under

and in accordance to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the said defendant shall give and furnish upon such appeal, and that upon the giving of said security the injunction herein granted shall be suspended and stayed until the determination of said appeal by [52] said United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray, etc.

J. J. SCRIVNER,

N. A. ACKER,

Solicitors for Deft.

N. A. ACKER,

Of Counsel.

[Endorsed]: Filed May 22, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [53]

In the United States District Court, in and for the Northern District of California, Second Division.

IN EQUITY—No. 15,623.

SEARCHLIGHT HORN COMPANY,

Complainant,

vs.

SHERMAN-CLAY & COMPANY,

Defendant.

Assignment of Errors.

Now comes SHERMAN-CLAY & COMPANY, the defendant in the above-entitled cause, and files

the following assignment of errors upon which it will rely in the United States Circuit Court of Appeals for the Ninth Circuit, and which it will rely upon its appeal in the above-entitled cause, viz.:

Error of the Court in granting the preliminary injunction.

Wherefore the said defendant prays that the judgment of the said District Court be reversed and that such other and further order be made as may be meet and proper in the premises.

N. A. ACKER,

J. J. SCRIVNER,

Solicitors for Defendant.

[Endorsed]: Filed May 22, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [54]

*In the United States District Court, in and for the
Northern District of California, Second Division.*

IN EQUITY—No. 75,623.

SEARCHLIGHT HORN COMPANY,

Complainant,

vs.

SHERMAN-CLAY & COMPANY,

Defendant.

Order Allowing Appeal.

Upon motion of N. A. Acker, Esq., counsel for defendant, and on filing petition of Sherman-Clay & Company, defendant, together with an assignment of errors, it is ordered that an appeal be and is hereby

allowed to the United States Circuit Court of Appeals for the Ninth Circuit from the interlocutory order entered on the 29th day of April, 1913, granting an injunction *pendente lite* against the defendant herein; that the amount of the bond upon said appeal be, and the same is hereby, fixed at the sum of two thousand dollars; and it is further ordered that upon the giving of such security the injunction heretofore granted on the 29th day of April, 1913, shall be suspended and stayed until the determination of the said appeal by the said Circuit Court of Appeals for the Ninth Circuit, and that a certified transcript of the record and proceeding herein be forthwith transmitted to the said United States Circuit Court of Appeals.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed May 22, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [55]

*In the District Court of the United States for the
Northern District of California, Second Division.*

No. 15,623.

SEARCHLIGHT HORN COMPANY,
Complainant,
vs.
SHERMAN-CLAY & COMPANY,
Defendant.

Undertaking on Appeal.

Know All Men by These Presents, That the Fidel-

ity & Deposit Company of Maryland, a corporation organized and existing under and by virtue of the laws of the State of Maryland, is held and firmly bound unto Searchlight Horn Company, a corporation, in the sum of Two Thousand Dollars (\$2,000), to be paid unto the said Searchlight Horn Company, its successors and assigns, for which payment, well and truly to be made, the Fidelity & Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents, sealed with its corporate seal and dated this 22d day of May, 1913.

The condition of the above obligation is such that, whereas the above-named defendant has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the order made and entered by the United States District Court for the Northern District of California, Second Division, in the above-entitled cause, granting a preliminary injunction enjoining and restraining the defendant, its agents, servants, etc., pending the final hearing in said cause or until further order of this Court, from manufacturing, selling or using or offering for sale any horn for phonographs embodying the invention described in United States letters patent No. 771,441, granted Peter Nielsen, October 4, 1904, [56] and claimed by claims 2 and 3 thereof, as heretofore construed by this Court, which order was rendered and entered in said District Court and a writ of injunction issued in conformity therewith on the 29th day of April, 1913.

Now, therefore, if the above-named defendant shall prosecute said appeal to effect and answer all dam-

ages and costs if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

[Seal Fidelity & Deposit Co. of Maryland.]

**FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.**

By **PAUL M. NIPPERT,**

Attorney in Fact.

Attest: **JOHN D. ALCOCK, Jr.,**

Agent.

Approved:

WM. C. VAN FLEET.

[Endorsed]: Filed May 23, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [57]

**[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.]**

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,623.

SEARCHLIGHT HORN COMPANY,

Complainant,

vs.

SHERMAN CLAY & COMPANY,

Defendant.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing fifty-seven (57) pages, numbered from 1 to 57,

inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record on appeal is \$34.80; that said amount was paid by N. A. Acker, attorney for defendant; and that the original citation issued in said cause is hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 18th day of August, A. D. 1913.

[Seal] WALTER B. MALING,
Clerk United States District Court, Northern District of California. [58]

Citation [Original].

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Searchlight Horn Company, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 22d day of June, 1913, being within thirty days from the date hereof, pursuant to an order allowing appeal filed in the clerk's office of the District Court of the United States, for the Northern District of California, wherein Sherman-Clay & Company is appellant and you are appellee, to show cause, if any there be, why

the order granting an injunction rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 22d day of May, A. D. 1913.

WM. C. VAN FLEET,

United States District Judge. [59]

Service of within Citation, by copy, admitted this 23d day of May, A. D. 1913.

MILLER & WHITE,

Attorney for ———.

[Endorsed]: Original. No. 15,623. In the District Court of the United States, Northern District of California. Sherman-Clay & Company, Appellant, vs. Searchlight Horn Company, Appellee. Citation. Filed May 24th, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2307. United States Circuit Court of Appeals for the Ninth Circuit. Sherman-Clay & Company, a Corporation, Plaintiff in Error, vs. Searchlight Horn Company, a Corporation, Defendant in Error. Transcript of Record. Upon

Writ of Error to the United States District Court of
the Northern District of California, Second Division.

Received and filed August 18, 1913.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

SHERMAN, CLAY & COMPANY,

Appellant,

vs.

SEARCHLIGHT HORN COMPANY,

Appellee.

**Order Extending Time to [July 20, 1913, to] File
Record and to Docket Cause.**

Good cause appearing therefor, it is ordered that
the appellant may have to and including the 20th
day of July, 1913, within which to file its Transcript
of Record on Appeal and to docket the cause in the
United States Circuit Court of Appeals for the
Ninth Circuit.

Dated June 20th, 1913.

WM. W. MORROW,

United States Circuit Judge, for the Ninth Judicial
Circuit.

[Endorsed]: No. ——. United States Circuit
Court of Appeals for the Ninth Circuit. Order Un-

der Rule 16 Enlarging Time to ——— to File Record Thereof and to Docket Case. Filed Jun. 20, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

SHERMAN-CLAY & COMPANY,

Appellant,

vs.

SEARCHLIGHT HORN COMPANY,

Appellee.

Order Extending Time to [August 18, 1913, to] File Record and to Docket Cause.

Good cause appearing therefor, it is ordered that the appellant in the above-entitled cause may have to and including the 18th day of August, 1913, within which to file its record on appeal and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated July 18, 1913.

WM. W. MORROW,

United States Circuit Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to ——— to File Record Thereof and to Docket Case. Filed Jul. 8, 1913. F. D. Monckton, Clerk.

No. 2307. United States Circuit Court of Appeals for the Ninth Circuit. Two Orders Under Rule 16 Enlarging Time to August 18, 1913, to File Record Thereof and to Docket Case. Refiled Aug. 18, 1913. F. D. Monckton, Clerk.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SHERMAN, CLAY & COMPANY,
a Corporation,

Appellant

vs.

SEARCHLIGHT HORN COMPANY,
a Corporation,

Appellee

In Equity

No. 2307

BRIEF ON BEHALF OF APPELLANT.

This is an appeal from an order granting preliminary injunction in the suit of Searchlight Horn Company, a corporation organized and existing under the laws of the State of New York, having an office in Brooklyn, New York, against Sherman, Clay & Co., a corporation organized and existing under the laws of the State of California, having its office in the City of San Francisco, State of California, for alleged infringement of U. S. Patent No. 771,441, issued to Peter C. Nielsen, October 4,

1904, for alleged improvement in horns for phonographs. The bill was filed November 25, 1912, and the decree on preliminary injunction was granted April 29, 1913. For convenience, Sherman, Clay & Co. (the appellant) will be hereinafter referred to as the defendant, and the Searchlight Horn Company (the appellee) as the plaintiff.

The defendant, Sherman, Clay & Co., is a dealer in talking machines among other things, and is alleged to have sold the alleged infringing horns purchased from the Victor Talking Machine Company, in conjunction with the Victor Talking Machines, which horns are shown to have been procured by the Victor Company from the Standard Metal Manufacturing Company of Newark, New Jersey.

The motion for preliminary injunction in this case is based mainly upon the judgment in an action at law (writ of error case No. 2306) between the same parties for alleged infringement of the same patent, rendered in the United States District Court for the Northern District of California, on October 4, 1912, in favor of the plaintiff, for \$3578, which was subsequently reduced to nominal damages of One Dollar.

The object of the Bill in Equity was to restrain the defendant from the alleged infringement complained of in the action at law, as well as from continuing to sell the alleged infringing horns; the Bill also prays for an accounting, and that the defendant shall pay over to the plaintiff the gains and profits realized by the defendant, in addition to the damages sustained by reason of the alleged

infringement, together with its costs (Equity Record, pages 8 and 9).

The plaintiff's motion is based upon the affidavit of William H. Locke, Jr. (Record, page 13) and affidavit of Hubert G. Prost (Record, page 18). The defendant's answer, while admitting the said judgment of the said Court in the action at law, denies the validity of the said patent, in view of the prior art cited in the answer, material portions of which had not been before the Court in the action at law, and denied infringement.

The answer also set forth and averred **laches** on the part of the plaintiff in bringing its action in equity, in making this motion for preliminary injunction in December, 1912, after many years of manufacture, sale and use of the alleged infringing device by numerous manufacturers, with the full knowledge of the plaintiff, and allowing the defendant, without objection or suit to continue the sale of the said alleged infringing horns, and that the plaintiff was estopped from prosecuting the said action in equity by reason of the facts averred as a defense. (Equity Record, pages 22 to 33).

The defendant supported its defenses by the affidavits of Andrew G. McCarthy (Record, page 34) and William F. Morton (Record, page 41). The plaintiff also produced a rebuttal affidavit of William H. Locke, Jr. (Record, page 45).

ARGUMENT.

The plaintiff in its motion, and in its notice of motion, for preliminary injunction (Record, page

12), produced in this equity suit and relied upon the papers and pleadings, together with the exhibits and testimony on file, and of record in the said action at law between the parties, entitled: Searchlight Horn Company vs. Sherman, Clay & Co., No. 15,326, as well as on the Bill of Complaint in this equity case and the said affidavits of Locke and Prost, together with a trade catalogue referred to in the affidavit of Prost.

The case is, therefore, before this Honorable Court in this equity proceeding upon its merits, as disclosed in the said record, exhibits, etc., in the action at law. As the decision of the lower Court in this equity proceeding upon the merits is not *res adjudicata*, as far at least as this Honorable Court of Appeals is concerned, the whole record on the merits as to validity and infringement is before this Honorable Court for review in considering the question of whether the Court below in granting said preliminary injunction abused or exceeded its discretion, as well as in considering the question of laches, and the other defenses here presented.

In order to save the time of the Court in the argument of the action at law, and of this appeal, which were argued before this Honorable Court on November 3, 1913, the argument on the merits, as far as the matter shown in the action at law is concerned, was not repeated in the argument in the equity suit, and this question was submitted; it pertained to the merits of the equity suit equally as well, and was, therefore, submitted to this Honorable Court without further argument.

Defendant's contention is that the whole question

of merits involved and of record in the action at law which has been produced and relied upon by the plaintiff is before this Court in this equity suit independently of the judgment in the action at law, as far as the merits are concerned, and that defendant is entitled in this equity suit to a review of the said question of merits herein, even independently of the merits as embodied in the action at law as such. Should there have been in the action at law any failure or any insufficiency of any exception to cover any of the assignments of error, which we will submit, however, there was not, the merits should be considered and passed upon in this action in equity by this Honorable Court irrespective of any technical objections raised in the law action, which do not pertain here.

The judgment of the Court below in the law case, of course, cannot be considered as *res adjudicata* as to this case; the said judgment being now before this Honorable Court on writ of error, and consequently not final.

Re-Abuse of Discretion.

The defendant contends:

(1) That the Court below abused its discretion in granting the said preliminary injunction, in view of the facts shown by the record on the merits, in not denying the motion on the ground of want of patentability;

(2) That the Court below abused its discretion in granting the preliminary injunction, in view of

the fact that there was no proof in the record in the action at law of any sales by the defendant of alleged infringing horns, whose manufacture was not authorized by the plaintiff;

(3) That the Court below abused its discretion in granting preliminary injunction, in view of the fact that there was no proof of any sales by the defendant since the judgment in the action at law of any alleged infringing horns—the manufacture of which was not authorized by the plaintiff;

(4) That there was no evidence of any threat or intention on the part of the defendant to continue the sale of any alleged infringing horns since the judgment in the action at law; on the contrary, there was clear evidence that at the time the suit in equity was instituted, and subsequent to the judgment in the action at law, the defendant had discontinued the sales of the alleged infringing horns, and had given careful instructions to its employes not to sell any alleged infringing horns until further action by the Court. (See defendant's affidavits of Andrew G. McCarthy—Record, page 34—and of William F. Morton—Record, page 41).

(5) That the plaintiff was guilty of laches in bringing its motion for preliminary injunction, when, for a period of about six years, it had allowed the trade to manufacture and sell said infringing horns without suit, and without protest of suit, since November, 1906, until suit brought in November, 1912, with full knowledge.

(6) That the Court below abused its discretion in granting the injunction in view of the grave

doubt existing, both as to the plaintiff's right and the defendant's alleged wrong, and should not have granted the preliminary injunction;

(7) That the Court abused its discretion in granting the said preliminary injunction under the circumstances in view of the absence of any proof that the defendant was financially irresponsible, and in view of the fact which appears to the contrary that the defendant was and is a substantial going concern, of well-known financial responsibility;

(8) That the plaintiff's action should have been against the real parties in interest, namely: The Standard Metal Manufacturing Company of Newark, New Jersey, the manufacturer of the alleged infringing horns, or the Victor Talking Machine Company of Camden, New Jersey, which purchased the horns from the Standard Metal Manufacturing Company, and sold the same to the defendant dealer in San Francisco, in connection with the Victor machines;

(9) That the plaintiff has shown bad faith, and should not be entitled to equitable remedy in this case against a dealer on the Pacific Coast, when the suit should have been properly brought against the real defendant on the Atlantic Coast, which is the plaintiff's *habitat*, and place of business;

(10) That the Court abused its discretion in thus granting and continuing a preliminary injunction against a dealer, inasmuch as a suit in equity should have been brought if there was any ground for complaint, and now has been brought since the

judgment in the action at law, against the Victor Talking Machine Company in the United States District Court for the District of New Jersey, praying injunction and an accounting, which suit is pending, and in which the plaintiff has not as yet taken any testimony, or done anything further than file the Bill in Equity;

(11) That the plaintiff has shown bad faith in the said suits, and in the order of prosecution of the same, and does not come into Court with "clean hands"; the Court below, in granting said preliminary injunction, thus further abused its discretion.

CONCERNING THE FACTS.

All the facts relative to this case will not be fully gone into, as they have been so fully considered in the argument on the writ of error in the law case, and in the brief filed with this Court in that case, to which the attention of the Court is particularly directed in considering the present suit in equity. Among other things, the fact is—as shown in the action at law—that there is **no proof of any sales by the defendant of any alleged infringing horns which were not manufactured by an authorized source.** The proofs in the action at law, as well as in the present case, show that since May 8, 1908, under an arrangement with the plaintiff company—which then went out of business—the Standard Metal Manufacturing Company of New Jersey, supplied the market with these alleged infringing horns, and that the Victor Talking Machine Company since that time has purchased its

said horns from the said Standard Metal Manufacturing Company. As pointed out in the brief in the action at law, there is no evidence that the Victor Talking Machine Company purchased any of the said alleged infringing horns from any other source.

The proofs also show that Sherman, Clay & Co., the defendant, purchased all its alleged infringing horns since May 8, 1908, from the Victor Talking Machine Company, and that prior to that date it purchased them from the plaintiff, the Searchlight Horn Company. This matter is so fully considered in the brief of the defendant (the plaintiff in error) in the action at law that it will not be reconsidered here, but the attention of the Court is particularly directed to the consideration of the subject in the other brief herein; the evidence is fully discussed, and the facts here stated fully substantiated.

It is true that in the moving papers in this equity suit an affidavit has been produced, by the plaintiff, of William H. Locke, Jr., in which he attempts to **intimate** that the agreement with the Standard Metal Manufacturing Company only related to folding horns (bottom of page 16, Equity Record), and on page 14 of the Equity Record he **intimates** that the Victor Talking Machine Company procured most of its horns from the Tea Tray Company of Newark, New Jersey. A careful reading of Mr. Locke's statement, at the bottom of page 16 of the Equity Record, will show that he **does not directly state** that the license agreement between the plaintiff and the Standard Metal Manufactur-

ing Company related only to folding horns. His statement is necessarily guarded. He says (Equity Record, bottom page 16):

“The only license agreement complainant has ever entered into has been the business arrangement with the Standard Metal Manufacturing Company, hereinabove referred to, relating to the sale of folding horns on a division of the profits.”

It is thus seen that the words “relating to the sale of folding horns” is parenthetical, and **is not a direct averment** that the said agreement related only to folding horns. Mr. Locke could not make such an averment, in view of his clear testimony to the contrary in the action at law.

In regard to his statement that the Victor Talking Machine Company procured **its horns** principally from the Tea Tray Company (Equity Record, page 14), it will be seen here that Mr. Locke **does not make the direct averment** that the Victor Talking Machine Company procured the **alleged infringing horns** principally from the Tea Tray Company, as that would be in variance with his testimony in the action at law. He intimates that the Victor horns in suit were purchased from the Tea Tray Company, yet he **does not directly so state**. What he does say is: that the Victor Talking Machine Company “procured **its horns** to be made for them by other manufacturers, principally the Tea Tray Company of Newark, New Jersey.” As it appears by the evidence in the two cases, the Victor Talking Machine Company dealt in **numerous constructions of horns**, and no doubt it is true that

it bought many horns of other types and constructions from the Tea Tray Company. If it bought any of the alleged infringing horns from the Tea Tray Company there is no proof of the alleged fact in this, or in the other case.

As shown by the record in the law case, there can be no question but what the Standard Metal Manufacturing Company was an authorized manufacturer of the alleged infringing horns by the arrangement of May 8, 1908. The evidence is: that the Victor Talking Machine Company procured its alleged infringing horns from the said Standard Metal Manufacturing Company, and the defendant bought its horns from the Victor Company.

It might here be noted, showing the good faith of the defendant in this matter, that, while there was no proof in complainant's motion papers of any sale of an alleged infringing horn subsequent to the judgment in the action at law, the defendant voluntarily admitted (affidavit of Andrew G. McCarthy, Equity Record, page 35) that—while instructions had been carefully given, after the judgment in the law action, not to sell any more of the said alleged infringing horns until further order of the Court, and great care had been taken that none should be sold—it happened that thirty (30) of said alleged infringing horns were sold by the wholesale department of the defendant. It is further shown: that outside of these thirty (30) horns none others were sold, and that the strict instructions of the defendant company to its employees was to sell none, and to offer none for sale. The alleged infringing horns which appeared in the catalogue were in the

general catalogue, illustrating numerous and various other constructions of other horns and machines, which had been printed, and published, before the judgment in the action at law.

It is respectfully submitted that, under these circumstances also, the Court below abused its discretion in granting preliminary injunction where no preliminary injunction was called for, or warranted, in view of the well-settled decisions. In cases similar to the case at bar, it is respectfully submitted that the weight of authority appears to be, that there should be no preliminary injunction pending a final disposition of an action at law by the Appellate Court.

The defendant is responsible, and plaintiff can be adequately compensated. There is nothing to show any irreparable damage to the plaintiff, and the burden is on the plaintiff, under such circumstances, to show irreparable damage. In fact, the granting of the injunction would cause greater irreparable damage to the defendant than to the plaintiff.

It is respectfully submitted, that the plaintiff has been guilty of **gross laches** in this case, as hereinbefore pointed out, and as shown by the defendant's opposing affidavits. It is shown by the record in the law case, as well as by the papers in the equity suit, that a large number of manufacturers, and the trade generally, had been making and selling the alleged infringing construction ever since 1904, without any substantial protest or suit on the part of the plaintiff. The plaintiff shows by the rebuttal affidavit of Mr. Locke (Equity Record, pages

45 and 52) that the plaintiff sent out a circular to the trade November 15, 1906, notifying the trade generally of the alleged infringement of the Villy Reissue, No. 12,442, patent No. 771,441 of January 30, 1906, and of the Nielsen patent in suit. It states, *inter alia*:

“All of the so-called ‘Flower Horns’ made by our aforesaid competitors are flagrant infringements of said patents.”

The evidence is, that these so-called “flagrant infringements” were continued, at least up to suit brought, and that no serious attempt is shown to have been made by way of suit, or otherwise, to enjoin any of the said alleged infringements, but the plaintiff has allowed the trade generally, for a period of six years and more, to proceed unmolested, and the patent has never been adjudicated in any other suit. It is respectfully submitted that, under the well-settled authorities, the owner of a patent is barred, and estopped, from injunctive relief by preliminary injunction under these circumstances, and it is a question whether he is entitled under such circumstances to any relief whatsoever in a Court of Equity.

It is, therefore, respectfully submitted that the Court below erred in granting the preliminary injunction on the ground of *laches*.

The Bill Should Be Dismissed Under Such Circumstances.

It is respectfully submitted that the authorities show that the bill of complaint should be dismissed

upon hearing of motions of this character, when it clearly appears, as it does in this case, that the patent is invalid, and that the defendant did not infringe.

We would cite in support of this proposition as to the power of the Court to dismiss the bills of complaint upon hearings of such motions, a few cases, viz:

Harriman vs. North Securities Company, 197 U. S. 244; Castner vs. Coffman, 178 U. S. 168; Mast, Foos & Co. vs. Stover Mfg. Co., 177 U. S. 486; De Laval Company vs. Vermont Company, 109 Fed. Rep. 813; Streat vs. American Company, 115 Fed. Rep. 634.

CONCLUSION.

It is respectfully submitted, in view of the foregoing, that the Court below erred in granting the said preliminary injunction; that the same should have been denied, and that in granting the said preliminary injunction the Court below abused its discretion, and that the decree should, therefore, be reversed with costs to the appellant. All of which is respectfully submitted.

NICHOLAS A. ACKER,
J. J. SCRIVNER,
HORACE PETTIT,
Counsel for Appellant.

November 8, 1913.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

October Term, 1913.

SHERMAN CLAY & COMPANY,
a corporation,

vs.

SEARCHLIGHT HORN COM-
PANY, a corporation,

Appellant,

Appellee.

No. 2307

BRIEF FOR APPELLEE.

This is an appeal from an order granting a preliminary injunction in a suit by appellee against appellant in the Northern District of California for infringement of patent, No. 771,441, granted to Peter C. Nielsen on October 4, 1904, for a phonograph horn.

The bill was filed November 25th, 1912, and in addition to the usual allegations found in such bills

it sets out in paragraph 7 (Record 4-6) that on May 9, 1911, complainant commenced an action at law against Sherman Clay & Company, appellant herein, in the District Court of the United States for the Northern District of California, claiming infringement of the same patent involved herein, and that after a trial on the merits, upon pleadings and full proofs, a verdict was rendered by the jury on October 4, 1912, in favor of plaintiff for \$3,578.00, upon which verdict judgment was duly made and entered in favor of complainant for that sum, together with costs.

The bill further alleges that after the rendition of the verdict in said action at law, the defendant, Sherman Clay & Company, continued to sell and offer for sale, and at the time of the filing of the bill was selling and offering for sale, phonograph horns of the same identical design, form, and construction as those which were held by the jury to be an infringement of claims 2 and 3 of the patent in suit. In other words, the defendant continued the infringement after the verdict.

It will thus be seen that the preliminary injunction in this case against Sherman Clay & Company was granted upon the strength of a prior adjudication of the same patent, in the same court, in an action against the same defendant, for the sale of the same infringing article.

The notice of motion for preliminary injunction (Record 12) stated that upon the motion plaintiff would rely upon (1) the papers and pleadings together with the exhibits and testimony on file and of record in the said action at law, (2) the verified bill of complaint on file, (3) the affidavits of Wm. H. Locke, Jr., and Hubert G. Prost, and (4) the trade catalogue referred to in the affidavit of Prost.

The affidavits of Locke and Prost show that the infringing horns sold by defendant were obtained from the Victor Talking Machine Co., of Camden, N. J., and that since the verdict in the action at law Sherman Clay & Company continued to sell and offer for sale the same identical horns involved in the action at law; also that there is no fixed royalty established by the patent owner; that the plaintiff is able to supply the demand of the trade, and is willing to supply the defendant with the patented article, and that irreparable injury will ensue to the patent owner if the preliminary injunction is not granted.

Defendant replied to the motion by filing an answer and submitting affidavits of Andrew G. McCarthy and Wm. F. Morton, two of the employees of the defendant.

Said answer attacked the validity of the patent by citation of prior patents and publications and instances of alleged prior use, but no evidence in that behalf was offered at the hearing. The answer also alleged

upon information and belief that the plaintiff had been guilty of laches in not instituting the suit at an earlier date. The affidavit of McCarthy alleged that after the entry of the judgment in the action at law, he gave instructions to the clerks of Sherman Clay & Company not to sell or offer for sale any of the infringing horns, but admits that since that date Sherman Clay & Company has sold said horns in their wholesale department to the extent of about thirty. According to this allegation, the defendant discontinued the infringement *at retail*, but continued it *at wholesale*. The affidavit of Morton merely avers that no retail sales of the infringing horns had been made since the verdict in the action at law.

The affidavit of McCarthy further avers *on his information and belief* that the Victor Talking Machine Co. had been marketing these infringing horns since 1904, and had distributed them throughout the United States; also that certain other companies in the East, which are mentioned, had likewise been marketing said horns throughout the United States during the same period of time, and that the Searchlight Horn Company had permitted this infringement without protest, from which it is alleged by McCarthy that Sherman Clay & Company had been misled into the supposition that it had a right to market said infringing horns and that, therefore, plaintiff was guilty of such laches as to disentitle it to an injunction.

The affidavit of McCarthy further avers that the motion for an injunction was not made in good faith, but *as he is informed and believes* for the purpose of compelling Sherman Clay & Co. to compromise the action at law, wherein a judgment was rendered for \$3,750, and to harass and embarrass the defendant in the sale of its goods. (Note: The insincerity of this allegation will be apparent from the fact that plaintiff afterwards voluntarily remitted said verdict by reducing it to the nominal sum of \$1.00.)

Complainant then filed a rebutting affidavit by Wm. H. Locke, Jr., denying the allegation of laches set up by McCarthy and averring that the Victor Talking Machine Co., from whom Sherman Clay & Co. received the infringing machines, first began to sell the same in 1906, two years after the time alleged by McCarthy, and that Searchlight Horn Co. on May 9, 1906, duly notified the Victor Talking Machine Co. of said infringement and requested the discontinuance thereof; they also notified the other companies referred to in the affidavit of McCarthy, and even printed and spread broadcast a circular warning the trade generally of the infringement and notifying the public that the rights under said patent would be protected (Record 51-2). The affidavit of Locke further explains that the reason why suits were not earlier brought was because of a lack of financial means, and the inability of the Searchlight Horn Company to secure a competent attorney to take

charge of the litigation, the fact being that by reason of the infringements in the East, especially that of the Victor Talking Machine Company, the business of the Searchlight Horn Company was broken up and destroyed in May, 1908, and the company put into financial difficulties; the affidavit further shows that in the spring of 1910, the Searchlight Horn Company succeeded in securing their present attorney and instructed him to proceed with all due diligence against infringers; and said affidavit further states that the Searchlight Horn Company has at all times during its ownership of the Nielsen patent asserted its rights thereunder and its intention to prosecute infringers and has taken all means in its power to give publicity thereto, and that the Victor Talking Machine Company was well aware of its position in that behalf; and in answer to the charge made by McCarthy *on information and belief* that the motion is not made in good faith, but for the purpose of compelling a compromise and payment of the judgment in the action at law, Locke denies the same vigorously and says that he does not desire the defendant to settle and compromise the said action at law, but earnestly desires that said case be taken up on writ of error to this court to the end that there may be a final adjudication of the patent by the court of last resort.

After an exhaustive argument the lower court (Judge Van Fleet presiding) granted the preliminary injunction, but in the order allowing an appeal from

said order, the Court superseded the injunction pending the appeal upon the filing by defendant of a bond in the sum of \$2,000.00. This bond was filed and the writ of injunction was superseded pending appeal, so that the defendant has not been prevented from continuing the sale of the infringing machines, and has suffered no inconvenience or damage by reason of the injunction and order except that of being compelled to furnish said bond. As a surety company's bond is obtainable for almost a nominal sum, which is properly taxable as costs, such inconvenience may properly be considered as *nil*. So far from abusing his discretion, the learned Judge of the lower court acted with unusual leniency towards the appellant.

ARGUMENT.

On appeal from an order granting a preliminary injunction before the trial of a case on the merits, the review of the appellate court is limited to the inquiry whether the lower Court abused its discretion in granting the order.

The granting of preliminary injunctions rests in the sound discretion of the trial Court. By such injunctions the trial Court does not undertake to finally determine the rights of the parties, but only to preserve those rights in *statu quo* until a trial on the merits can be had. This is one of the many things

which the wisdom of the law has entrusted to the sound discretion of the trial Judge, to be exercised as he sees fit under the disclosed circumstances and conditions of each particular case. The rule has been so well settled by the decisions of this Court that it will only be necessary to refer to them, and in that behalf we cite *Jensen Can-Filling Co. vs. Norton*, 64 Fed., 662; *Southern Pacific Co. vs. Earl*, 82 Fed., 690; *Kings County Raisin & Fruit Co. vs. U. S. Consolidated Seeded Raisin Co.*, 182 Fed., 60.

Now on the record before this Court, did the learned trial Judge abuse his discretion in granting the motion for preliminary injunction?

In the first place the action at law was against the same defendant for the sale of the same machines and for infringement of the same claims of the patent as in the case at bar. Under these circumstances we might well have taken the position that said judgment in the action at law operated as *res adjudicata* against the defendant herein. Said action at law was tried on the merits after a full exposition of the prior art and elaborate arguments *pro* and *con*. Defendant had its day in court on the issues involved therein, and while that judgment was in force, clearly the defendant was not entitled to re-litigate herein matters disposed of therein. *Cheatham vs. Transit D. Co.*, 203 Fed., 285.

Furthermore, plaintiff's patent does not appear in this record. It has not been brought to this court

nor made a part of the record by the appellant. Neither has the prior art been brought here or made a part of the record, nor has any portion of the record or proceedings in the action at law been brought here or made a part of the record by the appellant, although in the notice of motion for an injunction appellee stated that it would rely on, and as a matter of fact did rely on and use, the papers and pleadings together with the exhibits and testimony on file and of record in the said action at law against Sherman Clay & Co. Under these circumstances this Court is not in a position to consider the scope or validity of the patent in suit, or the effect of the prior art thereon, or the matter of infringement, or any of those numerous other things which influence the Court's discretion in granting a preliminary injunction. It is idle, therefore, for appellant to argue here that the lower Court abused its discretion in granting a preliminary injunction, since the facts on which the Court exercised its discretion have not been brought to this Court nor made a part of the record by the appellant.

The only matter before the lower Court in this equity suit which was not before it in the action at law is the alleged charge of *laches* on the part of the Searchlight Horn Company. That charge is made by an employee of the appellant at San Francisco, and is made *on his information and belief*. He does not show the source of his information upon which he forms his belief, but merely makes his allegation *on*

information and belief. Consequently, the lower Court would have been fully justified in overruling that defense on the ground that it was not supported by any competent evidence. The defense was an affirmative one and the burden of proof was on defendant to establish it by satisfactory and convincing evidence. The only evidence offered by defendant was an allegation on information and belief by an employee of defendant residing at San Francisco concerning matters of fact supposed to have occurred in New York many years ago.

But furthermore, this defense was fully met by the affidavit of W. H. Locke, Jr., the president of the Searchlight Horn Company, who was fully aware of all the facts and had personal knowledge thereof. In substance, the charge which McCarthy makes *on information and belief* is that for many years last past the Victor Talking Machine Company, from whom Sherman Clay & Company secured the infringing devices, and also certain other phonograph companies in the East, were engaged in marketing the infringing articles throughout the United States without protest from or objection by the Searchlight Horn Company, and from that fact, *alleged on information and belief*, it is asserted by Mr. McCarthy that the defendant was misled into believing that the defendant had a right to sell the infringing machines and to infringe this patent to its heart's content. Mr. Locke meets this charge fully and fairly. He states that the Victor

Talking Machine Company did not commence to infringe in 1904, as alleged by McCarthy on his information and belief, but not until 1906; that in May, 1906, the Searchlight Horn Company formally notified said Victor Talking Machine Company in writing as to the patent and the infringement thereof, and notified them to cease said infringement; and that the Searchlight Horn Company would protect its rights in the courts; also that the Searchlight Horn Company was unable to commence suit at that time by reason of its lack of money and inability to secure a competent attorney to prosecute so heavy a litigation; also that they finally succeeded in obtaining necessary means and employing a competent attorney in 1910, and immediately thereafter began this action at law against Sherman Clay & Company, which resulted in the verdict aforesaid. In addition to this the affidavit of Locke shows that the company notified other infringers and sent out a printed notice to the trade in general warning them against infringement of the patent in suit, and notifying them that the company intended to uphold its rights under the patent, and the said affidavit of Locke further states as follows (Record 48-9):

“The Searchlight Horn Company has at all times asserted its rights under said Nielsen patent and its intention to prosecute infringers, and has taken all means in its power to give publicity thereto, and all of the manufacturers and dealers

in talking machines and especially the Victor Talking Machine Company and the Tea Tray Company have been well aware of the Searchlight Horn Company's position in the matter.

"The reason why suits were not brought before was because of lack of means on the part of the Searchlight Horn Company and their inability to secure the services of a proper and competent attorney to take charge of the litigation. In the spring of 1910 I secured the services of our present attorney and gave him instructions to proceed with all reasonable diligence in the prosecution of all infringers. He was required to do a great deal of preliminary work and investigation before suit could be filed, and I believe that he proceeded with reasonable diligence thereafter."

In view of the insufficient and make-shift allegation on information and belief by McCarthy, a mere employee of Sherman Clay & Company, on the one side, and the positive denial of laches and the statement of facts in support of such denial by Wm. H. Locke, Jr., the president of the Searchlight Horn Company, who was personally familiar with and cognizant of the facts of the case, on the other side, it is idle to assert that the learned Judge of the lower court abused his discretion in overruling the feeble and insubstantial defense of laches.

And finally, we doubt if the appellant has framed any sufficient assignment of error to justify the Court in considering the point of alleged laches. The only

assignment of error made in this case, as appears from page 59 of the record, is as follows:

“Error of the Court in granting a preliminary injunction.”

This assignment of error is so indefinite that we doubt if an appellate court would be justified in considering it at all. Does the appellant mean by this assignment of error that the patent was invalid by reason of want of invention, or anticipation by prior patents and publications, or by prior use, or that the claims were so limited as not to be infringed, or does it mean that plaintiff was guilty of laches, or does it mean that the lower Court abused its discretion in any particular? It is impossible to determine from this assignment of error what is the precise point on which the appellant relies for a reversal by this Court, and for that reason this Court would be justified in affirming the order by reason of failure of the appellant to submit any intelligent and sufficient assignment of error.

The case is a very simple one. A patent owner brings an action at law against an infringer, in which action a full and exhaustive trial is had on the merits with the result that a verdict is rendered in favor of the plaintiff. Such verdict, of course, covered only past infringement. After the verdict the defendant continues to infringe by continuing to sell the same

identical class of articles which were held to be an infringement. Thereupon the patent owner brings a suit in equity against the defendant in the same court to obtain an injunction against the further sale of the same infringing articles, and moves for a preliminary injunction. The same defenses are set up in the equity suit that were set up and fully tried out in the action at law, with the additional defense of laches on the part of the patent owner made *on information and belief* of an employee of the defendant, which charge of laches is fully and completely denied by the president of the plaintiff corporation, who was personally cognizant of all the facts and circumstances relating to the matter. Thereupon the motion for preliminary injunction was granted, but its operation pending appeal suspended upon the filing of a supersedeas bond on the part of the defendant in the moderate amount of \$2,000. Do these facts disclose an abuse of discretion by the lower Court? To propound the question is to answer it in the negative.

We ask an affirmance of the order appealed from.

Respectfully submitted.

JOHN H. MILLER,
WM. K. WHITE,
Counsel for Appellee.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

October Term, 1913.

SHERMAN CLAY & COMPANY,	} No. 2307. Appeal from Order Grant- ing Prelimi- nary Injunc- tion.
<i>Appellant,</i>	
vs.	
SEARCHLIGHT HORN COMPANY,	}
<i>Appellee.</i>	

REPLY BRIEF OF APPELLEE.

No oral argument was made by the appellant in this case, and we had no means of knowing what points would be relied on until we received the subsequently filed brief on behalf of appellant. That brief is filled with so many misstatements and false deductions that we deem it proper to call the court's attention thereto by a reply brief.

The sole and only assignment of error appearing in the record, which is at page 59, reads as follows:

“Error of the court in granting the preliminary injunction.”

It does not state wherein there was any error, nor does it assign any abuse of discretion on the part of the lower court. Yet, in the reply brief of appellant, this one assignment of error has been multiplied into eleven assignments or reasons why the order should be reversed. In fact, at the end of the brief, a 12th assignment of error is added, consisting of the contention that the entire suit should be dismissed by this court.

Another preliminary matter may be noted. At pages 4 and 5 of appellant's brief it is contended that this case is now before this court upon the merits as disclosed in the record, exhibits, etc., in the action at law, No. 2306, and that the whole question of merits involved and of record in said action at law is before this court in this equity suit, independently of the judgment in the action at law, and that the appellant herein is entitled to rely thereon just as though the entire record in the action at law were embodied in the record in this equity case.

It is true that in the notice of motion for a preliminary injunction in the lower court it was stated that the appellant would rely upon the papers and pleadings, together with the exhibits and testimony on file and of record in the said action at law, as well as upon the bill of complaint herein and the attached affidavits. But the said papers and pleadings, exhibits, and testimony in the said action at law have not been embodied in, and are no part of, the record herein.

It does not even appear from the record herein that the said papers, pleadings, exhibits and testimony in the action at law were used or put in evidence upon the hearing of the motion for preliminary injunction in the lower court. Indeed, the certificate of the clerk to the record herein would imply that they were not put in evidence. That certificate appears at pages 62 and 63 of the present record, and is to the effect that the foregoing pages, to which it is attached, are "a full, true, and correct copy of the record and proceedings in the above entitled cause and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit." But the foregoing pages certified to by the Clerk do not contain any of the proceedings or exhibits or testimony of the action at law. In fact, even the patent in suit nowhere appears in or as a part of the present record. So far as the present record is concerned, this court has no knowledge of the contents of said patent, much less of its scope. Nor do any of the prior patents relied on by appellant appear in this record, nor any of the testimony in the action at law.

Under these circumstances, this court is not in a position to intelligently pass on the question of the lower court's discretion in granting the injunction. The record in the action at law is no part of the present record, and its absence therefrom is due solely to the appellant. It was his duty to see that a proper record was made up, and if he desired to rely upon

anything appearing in the action at law, it was his duty to make it a part of the record herein. The fact that the record in the action at law has been brought to this court in another case does not make it a part of the record herein. The record of one case in this court can not be read into and be made a part of the record in another case without some proper proceedings taken to that effect. There is no stipulation here that the record in the action at law shall be taken to be a part of the record of this equity case. The practice in an appellate court must be orderly and according to established rules. The course pursued by appellant in this regard violates a fundamental rule of practice.

Subdivision 3 of Rule 14 of this court, says:

“No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions and other proceedings which are necessary to the hearing in this court, shall be filed.”

This point would appear to be settled by the decision of this court in *Arizona vs. Clark*, 207 Fed., 821.

We now address ourselves to the eleven assignments of error contained in appellant's brief.

1. *The first assignment is that the motion should have been denied on the ground of want of patentability.* This is merely a bald statement of counsel.

No argument is made thereon in the brief. We therefore pass it over without further comment.

2. The second assignment is that there was no proof in the record in the action at law of any sales by the defendant of the infringing horns whose manufacture was not authorized by the plaintiff.

Barring the fact that appellant has no right to rely upon the record in the action at law for the reason that it is no part of the record herein, we deny the statement emphatically. The theory of appellant's counsel in that behalf is that on May 8th, 1908, the Searchlight Horn Company went out of business and turned over to the Standard Metal Mfg. Co. the right to supply Nielsen horns to the trade, and that the Victor Talking Machine Company, from whom Sherman Clay & Company secured its infringing horns, had obtained these horns from the Standard Metal Mfg. Co., from which fact it is alleged that the infringing horns were procured from a licensed manufacturer. This statement is not correct.

In the first place, it is a suggestive fact that neither in the answer nor in the affidavits of the appellant does any one on behalf of appellant assert or allege that the infringing horns of Sherman Clay & Co. were manufactured by the Standard Metal Mfg. Co. The absence of such an allegation is doubtless due to the fact that it could not be truthfully made. If it were a fact, appellant would have been too glad and

anxious to state it, and would have stated it in his answer and affidavits. It may be surmised, though it is only a surmise at best, that since May 8, 1908, Sherman Clay & Co. have sold *some* horns which had been manufactured by the Standard Metal Mfg. Co.; but it is true beyond dispute that during that time they have also sold horns which were manufactured by the Tea Tray Co. of New Jersey, and that company does not pretend to have ever had any license.

Furthermore, there never was any license from the Searchlight Horn Company to the Standard Metal Co. to manufacture the Nielsen patented horn. Whatever arrangement there was between the two companies related solely to a folding or collapsible horn and to that only. At page 14 of the record, Mr. Locke says in his affidavit that in May, 1908, the Searchlight Horn Company "made a business arrangement with "the Standard Metal Manufacturing Company of "New Jersey to make and sell the Searchlight *folding* "horns on a division of the profits resulting there- "from." And at the bottom of page 16, he says:

"The only license agreement complainant has ever entered into has been the business arrangement with the Standard Metal Manufacturing Company hereinabove referred to *relating to the sale of folding horns* on a division of the profits."

No evidence was produced at the hearing by appellant to controvert these statements. They stand unimpeached and uncontradicted. Hence, it is idle for

appellant to now urge that the agreement covered the sale of the Nielsen patented horns. Appellant had ample opportunity in the lower court to clear up this matter, but produced no evidence in opposition to the statements of Mr. Locke.

And still further, the record in this case shows that the appellant was selling those infringing horns prior to the arrangement with the Standard Metal Manufacturing Co. made in 1908.

3. *The third assignment of error in the brief is the assertion that there was no proof of any sales by the defendant since the judgment in the action at law of any infringing horns which had not been authorized by the plaintiff.* This is another misstatement. The bill of complaint alleges such sales (Record, 6). The affidavit of Locke alleges such sales on information and belief. The affidavit of Prost alleges that since the judgment in the action at law he saw on exhibition for sale in the store of the defendant at San Francisco one of the infringing horns and that one of the clerks of the defendant offered to sell him horns of that kind and delivered to him a printed catalogue showing cuts and descriptions of the same (Record 19). And finally, the affidavit of McCarthy, one of the managers of the defendant corporation, shows at page 35 of the record, that since the entry of said judgment, the wholesale department of Sherman Clay & Company had sold approximately thirty of the said infringing horns. In this behalf it is pre-

tended by appellant that after the judgment instructions were given to the clerks in the stores of appellant to sell no more of these horns. At best that appears to have related merely to the retail department; for, as we have already shown, Mr. McCarthy sold in the wholesale department some thirty of said horns. We thus see that even if the retail department ceased its sales, the wholesale department continued the sales. And even if such instructions were given to the clerks, it would appear that they were not followed because Mr. Prost testified that one of said clerks offered to sell him infringing horns.

4. *The fourth assignment of error in the brief is that there was no evidence of any threat or intention on the part of the defendant to continue the sale of the infringing horns after the entry of the judgment.* This is dispised of by the observations already made showing that the retail clerks offered to sell Mr. Prost infringing horns and furnished him with a catalogue containing their description, and the further fact that McCarthy actually sold thirty of them.

5. *The fifth assignment of error in the brief is that the plaintiff was guilty of laches in bringing its motion for preliminary injunction.* This contention is set up in the affidavit of McCarthy only on his information and belief. He does not give the source of the information upon which he forms his belief. Such a defense could not be made out upon such flimsy

evidence; but, in any event, it is fully met by our affidavits. Beginning at page 47 of the Record, Mr. Locke gives a history of the matter, and it appears therefrom that the Searchlight Horn Company always asserted its rights under the Nielsen patent, but was delayed in bringing suits because of lack of financial means. The appellant cuts a sorry figure in court when it has to rely on the poverty of its opponent to make out a case of laches. Courts are established for the poor man as well as for the rich man, and poverty cannot be imputed to a man as a crime.

6. *The sixth assignment of error in the brief asserts that the injunction should have been denied because of the grave doubt existing as to the plaintiff's rights and the defendant's wrong.* No argument is made under this head. Neither shall we make any, except to allege that there is nothing in this record to show any such grave doubt. Since the patent is not in the record, how can the court decide anything regarding its validity?

7. *The seventh assignment of error in the brief is that the injunction should have been denied because of the absence of any proof that the defendant was financially irresponsible.* According to this theory, no preliminary injunction could ever be granted against a rich defendant, but only against an impecunious one. Having already tried to capitalize the appellee's poverty, the appellant now tries to capitalize his own

wealth. There is no such rule of law. While insolvency of a defendant may be an additional reason for granting an injunction in some cases, it is not indispensable. The rich man is as much subject to the law as the poor man.

9. *The 8th, 9th, 10th and 11th assignments in the brief are to the effect that the suit should have been brought in New Jersey against the Standard Metal Co. or Victor Talking Mach. Co., and that it was an evidence of bad faith to bring the suit in California against Sherman Clay & Co.* According to this theory a patent owner has no right to sue any infringer of his patent wherever such infringement may be found, but must find out the person who supplied the infringer with the articles and then bring suit against that person, wherever found. The statement of the proposition is its own refutation. A patent owner is entitled to sue any infringer he may select, and he must sue that infringer at the place where he resides. It is not for the infringer to decide which one may be sued or where the suit may be brought. That matter rests wholly in the sound judgment of the patent owner.

10. *The last assignment of error, not numbered, appearing at the bottom of page 13, is that the bill should be dismissed by this court, because it appears that the patent is invalid and that the defendant has not infringed.* The learned counsel even goes to the extent of citing authorities to show the power of this

court to dismiss the bill. No one disputes the power of the court in that behalf; but it can scarcely be argued with any show of reason that this bill should be dismissed because of invalidity of the patent, when the said patent is no where contained in the record and is not before this court for inspection. The truth of the matter is that this appeal is, in our opinion, purely frivolous. Instead of dismissing the bill, this court ought to impose terms upon the appellant for having prosecuted a frivolous appeal.

Respectfully submitted.

JOHN H. MILLER,
WM. K. WHITE,
Counsel for Appellee.

